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Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH W. TEAGUE and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, SWANNEE BECK, and KAREN PEREZ TUCKER, Lifetime Partners of PTL, As Representatives of a Nationwide Class consisting of 150,000 PTL Lifetime Partners and of 27,839 Persons Who Partially Paid for Lifetime Partnerships,

Plaintiffs - Petitioners

v.

JAMES O. BAKKER, DAVID A. TAGGART, AIMEE CORTESE, and DELOITTE, HASKINS & SELLS

Defendants - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fourth Circuit Decision Determining the PTL Lifetime Partners' Right To Recover Their $160,000,000 of Investments, Which Dismisses Primary Liability Claims or Ignores Them, Conflicts with This Court's Decision in *Central Bank of Denver* on Securities Liability, by Overextending That Decision to Primary Liability and Making It Retroactive?

A. Whether Primary Liability Claims against PTL's Independent Auditors Are Barred by *Central Bank*, Which Barred Only Aiding and Abetting Claims?
B. Whether Claims against PTL's Directors and Officers, Based on Their Negligence in Permitting Securities Violations, Are Barred by *Central Bank*?
C. Whether the Decision in *Central Bank* Should Be Retroactive, in View of the Prior Unanimity of the Circuits?

II. Whether the Fourth Circuit Decision Effectively Immunizing PTL's Outside Auditors or Ignoring Claims Conflicts with This Court's Decisions on Accountant Liability in *Arthur Young*, *Reves I*, and *Central Bank of Denver* and Other Circuits, by Ignoring False Certification of PTL's Financial Statements and Implying Immunity for Accounting Firms?

A. Whether Auditors Are Immunized for Securities Liability, Contrary to *Arthur Young*, *Reves I*, and *Central Bank*?
B. Whether Auditors Are Immunized for RICO Liability, Contrary to the Statute and *Reves II*?

C. Whether Auditors Are Immunized for Fraud Liability, Contrary to *Arthur Young*?

III. Whether the Fourth Circuit Decision Undercutting Civil RICO Liability Conflicts with the Decisions of This Court and of Other Circuits, by Gutting the Distinction Between Civil and Criminal RICO, Conflicting with Recent Decisions that Involvement in Management and Ownership of Stock Are Not Necessary under § 1962(b), and Lifting the Interest Acquired and Reliance Standards to Unreachable Levels, So That No One Was Liable for PTL Fraud?

A. Whether Civil RICO Instructions Can Be Peppered with References to Crimes and Criminal Intent Requirements?
B. Whether § 1962(b) Can Be Bent To Require Stock Ownership (Which Is Impossible in a Nonprofit Organization) and To Require Involvement in Management (Which This Court Said Is Not Required, in *Reves II*)?
C. Whether § 1964(c) Can Be Interpreted To Require Reliance on Each RICO Participant and Aider, Even Though They Try To Act Behind the Scenes?

LIST OF PARTIES

The parties to the proceedings below were the plaintiff-petitioner PTL Lifetime Partner class (certified by the district court), and the defendant-respondents Jim Bakker, David Taggart, and Aimee Cortese, and the accounting firm Deloitte Haskins & Sells (now known as Deloitte Touche, and described by the panel as DH&S). Other parties to the proceedings below that were dismissed were Laventhol & Horwath and William J. Spears (dismissed automatically because of the firm's bankruptcy during trial); and Roe Messner a/k/a Ronald Messner, Messner Enterprises, and Commercial Builders of Kansas (dismissed voluntarily).

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INTRODUCTION

This is the case that determines who is liable for PTL's sale of over $160,000,000 of Lifetime Partnerships to small investors, and the destruction of the value of those Partnerships through various frauds.

The lower court opinion is very thorough in holding that PTL's Lifetime Partnerships were securities. However, it overextended this Court's securities decision in *Central Bank of Denver* when it went far beyond the aiding and abetting claims, to invalidate or ignore primary securities liability claims against PTL's accountants and negligence claims against PTL's directors and officers, and to immunize those accountants on RICO and fraud claims.

OPINION BELOW

The opinion below (Appendix I) is reported at 35 F.3d 978 (4th Cir. 1994). Related opinions uphold Jim Bakker's criminal conviction, *United States v. Bakker*, 925 F.2d 728,731-32 (4th Cir. 1991); approve settlement of the other accounting firm's liability for $45,000,000, *In re Laventhol & Horwath,* No. 90 B 13839 (S.D.N.Y. Bkry. Aug. 24, 1992); deny insurance coverage for nonnegligent acts of directors and officers, *Employers Reinsurance Corp. v. Teague,* 972 F.2d 339 (4th Cir. 1992); *see National Union Fire Ins. Co. v. Heritage Village Church*, No. C-C-90-150-M (W.D.N.C. filed 1990); and adjudicate PTL's bankruptcy, *Benton v. Bakker,* 92 B.R. 1000 (D.S.C.Bkry. 1988),

aff'd, No. 0:89-81-16 (D.S.C. Oct. 26, 1990), *aff'd*, 944 F.2d 901-02 (4th Cir. 1991).

JURISDICTION

Federal jurisdiction exists under 28 U.S.C. § 1331. The Fourth Circuit entered its opinion September 23, 1994, and denied rehearing October 18, 1994. This Court's jurisdiction is under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves the Securities Exchange Act § 10(b) and Rule 10b-5 (15 U.S.C. § 78j(b)), RICO (18 U.S.C. §§ 1961-1964), and state statutes (N.C.G.S. §§ 75D-2, 1-52, 53-26.1, 53-35, 53-28A; S.C. Code § 27-32). These statutes are quoted in the appendix.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

This lawsuit was filed by a class of more than 160,000 PTL Lifetime Partners, who each paid an average $1,000 for a PTL investment program. The defendants are PTL officers and directors and PTL's independent accounting firm. Primary securities claims were made against Jim Bakker and the accountants (Deloitte Haskins & Sells, or DH&S), and negligence in permitting securities violations was alleged against some directors and officers: Jim Bakker, Vice President David Taggart, and Director Aimee Cortese. The Lifetime Partners were certified as a nationwide class, and more than 150,000 (94%) remained in the class. (35 F.2d at 981-84, Appendix I.)

The trial court granted a directed verdict on securities claims on the sole ground that Lifetime Partnerships were not securities. (Appendix III.) The jury rendered a $129,000,000 verdict against Bakker for common law fraud. The other accounting firm, Laventhol & Horwath, filed for bankruptcy the day after the Lifetime Partners rested their case against it, and subsequently settled for $45,000,000. *In re Laventhol & Horwath,* No. 90 B13839 (S.D.N.Y.Bkry. Aug. 24, 1992).

The Fourth Circuit correctly held that Lifetime Partnerships are securities, and reversed the directed verdict that had been entered under securities law. However, it applied this Court's decision in *Central Bank* retroactively to aiding and abetting claims, it overextended that to dismiss the primary liability claims against the accountants and the negligence claims against directors and officers, or ignored them.

B. STATEMENT OF THE FACTS

1. PTL Lifetime Partnerships as Securities

Jim Bakker and PTL raised over $160,000,000 by selling "Lifetime Partnerships" for an average $1,000, to build hotels to be managed by PTL and its management company. These Partnerships were sold with promotional materials that said the Partnership "will appreciate in value, making it of greater value than at the time of its origination," and that the Partnership in fact already had appreciated to at least "$20,000" or even "$1,005,487." (35 F.2d at 988.) The promotional materials also said that the Partnership was an "investment,"

and that "[y]ou cannot find a better investment opportunity anywhere." (*Id.* at 984.) Finally, they noted that 50% of the hotel rooms would be rented commercially, because "[w]e have to made the funds up from people who are renting the other rooms," to provide free lodging to Lifetime Partners. (*Id.* at 988.) Thus, profit was promised by appreciation, investment value, and commercial rents. Some other facts showing Lifetime Partnerships to be securities were summarized in the decision. (*Id.* at 986-90.)

The Fourth Circuit held that "the district court erred in granting appellees' motion for a directed verdict on plaintiffs' federal securities fraud claim." (*Id.* at 991.) The court followed the holding that "it is not inappropriate that a promoter's offerings be judged as being what they were represented to be." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 352-53 (1943).

2. Bakker's Fraud and Negligence

The promises failed, and the Lifetime Partners lost their entire $1,000 investments--over $160,000,000:

> Bakker promised television viewers that he would limit the sale of partnerships to ensure that each partner would be able to use the facilities annually. Appellant, however, *oversold* the partnerships. He promised, for instance, to limit the sale of Grand Hotel partnerships to 25,000 but actually sold 66,683. In addition, Bakker used relatively few of the funds solicited from the partners to construct promised facilities. In fact, of the proposed Heritage Village facilities, only the Grand Ho-

> tel and one bunkhouse were actually completed. Instead, Bakker used partnership funds to pay operating expenses of the PTL and to *support a lavish lifestyle*. This extravagant living included gold-plated fixtures and a $570 shower curtain in his bathroom, transportation in private jets and limousines, an air-conditioned treehouse for his children and an air-conditioned doghouse for his pets. This combination of overselling partnerships and diverting partnership proceeds meant that the overwhelming majority of the partners never received the lodging benefits Bakker promised them.

Teague, 35 F.3d at 982, quoting 925 F.2d at 731-32.

3. The Accountants' Primary Securities Violations

Bakker responded to questions by saying on television, in newspaper ads, and in mass mailings that "[w]e have been audited by Deloitte Haskins & Sells for many years," and that [o]ne of the big audit firms in America is in here all the time."

The accountants (DH&S) falsely certified PTL's financial statements, without any qualification, and covered up the fraud and negligence, as summarized at 8-11 *infra*. As the Fourth Circuit noted, DH&S "administered PTL's 'Executive Payroll Account' upon which checks transmitting salary and benefits to Bakker" for up to $1.9 million a year were drawn (35 F.3d at 982); "expurgated" a qualification from its auditor's report to cover up PTL's insolvency (*id.* at 983); and covered up the pending IRS audit of Bakker's private inurement while privately recognizing the "IRS exam will find private inurement [and] it'll go to court [and] we'll lose" (*id.* at 984). DH&S also

covered up PTL's securities violations after being told the "obvious legal issues involved are ... [t]he possibility of a securities offering," and covered up Bakker's flagrant oversales of Lifetime Partnerships. Thus, the Fourth Circuit acknowledged that "the record contains evidence which supports plaintiffs' various theories of aiding and abetting liability on the part of DH&S." (*Id.* at 994.)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISION IN CENTRAL BANK OF DENVER ON SECURITIES LIABILITY, BY OVEREXTENDING THAT DECISION TO PRIMARY LIABILITY AND MAKING IT RETROACTIVE.

Central Bank of Denver, N.A. v. First Interstate Bank, 114 S.Ct. 1439 (1994), only required dismissal of aiding and abetting claims, and did not require or allow dismissal of primary liability claims and director negligence claims. The Fourth Circuit erroneously and grossly overextended *Central Bank,* or simply ignored the other claims,[1] and thereby impaired

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[1]The Fourth Circuit did not expressly affirm on the primary liability claims, but simply overlooked them and then referred to only the Bakker claims being remanded for trial. 35 F.3d at 991 ("we must affirm the district court's dismissal of plaintiffs' claim that DH&S aided and abetted Bakker's alleged federal securities fraud violation"); *id.* at 992 ("In summary, we reinstate plaintiffs' securities fraud claims under federal and state law against Bakker, but we affirm the dismissal of plaintiffs' federal and state securities fraud claims [only aiding and abetting

the ability of the PTL Lifetime Partners to recover their $160,000,000.

The Fourth Circuit was correct that securities claims were wrongly dismissed by a directed verdict for PTL's Jim Bakker, because the trial court erred in holding that Lifetime Partnerships were not securities.

However, because the securities claims against Bakker were wrongly dismissed, the securities claims based on primary liability were also wrongly dismissed against PTL's accountants, Deloitte Haskins & Sells (DH&S). For the same reason, the negligence claims based on negligently permitting securities violations were also wrongly dismissed against PTL directors and officers.[2] Yet the Fourth Circuit upheld that.

A. *Primary* Liability Claims against Accountants Who Commit Securities Fraud Are Not Barred by *Central Bank of Denver,* but the Fourth Circuit Grossly Overextended *Central Bank* To Ignore Primary Liability Claims against PTL's Accountants under § 10(b).

1. Primary Liability of the Auditors Was Alleged.

The Lifetime Partner class consistently alleged primary securities liability against DH&S. Those allega-

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claims were mentioned] against DH&S."). The same is true of the director and officer negligence claims.

[2]The district court recognized this in denying DH&S's and the directors' and officers' motions to dismiss, and their motions for summary judgment, on securities claims. The court then denied those parties' motions for directed verdict on primary securities liability and director-officer negligence, except that the motion was granted on whether there was a security at all.

tions fill 5 pages of the restated amended complaint (Appendix V), as well as of the original complaint.

2. Central Bank Permitted Auditor Primary Liability

This Court's decision in *Central Bank*, while overturning aiding and abetting liability, expressly noted that accountants may still be liable for primary securities violations under § 10(b) (114 S.Ct.at 1455):

> Any person or entity, **including a lawyer, accountant,** or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies **may be liable as a primary violator** under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met. . . . In any complex securities fraud, moreover, **there are likely to be multiple violators** . . . .

Accord, Reves v. Ernst & Young, 494 U.S. 56 (1990).

Moreover, this Court in *Central Bank* did not restrict conspiracy liability under § 10(b). *E.g., Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 394 (1982) (federal: "those persons who are participants in a conspiracy to manipulate the market in violation of those rules are also subject"); *Burns v. Gulf Oil Corp.*, 246 N.C. 266, 98 S.E.2d 339, 343-44 (1957) (N.C. conspiracy). Conspiracy liability of DH&S was alleged, and the Fourth Circuit should not have struck it out or ignored it under *Central Bank.*

3. DH&S Acts Support Primary Liability.

DH&S committed primary securities violations by its manipulative and deceptive acts, culminating with false and fraudulent certification of PTL's financial state-

ments. Some acts were noted by the Fourth Circuit:

> *DH&S administered PTL's "Executive Payroll Account"* upon which checks transmitting salary and benefits to Bakker and other PTL executives were drawn [for millions of unauthorized dollars]....
> The compensation, bonuses, and cash benefits paid to Bakker, Tammy and Dortch all came from the Executive Payroll Account managed, through mid-1985, by DH&S....
> A draft of DH&S's audit report . . . expressed concern over "whether PTL w[ould] be able to continue as a 'going concern' based on current assets of only [$]8.6 million against [$28.5 million in current liabilities." J.A. 2046. Such concern *[qualification], however, was expurgated from the report* before its issuance....
> A DH&S workpaper . . . states: "IRS exam will find private inurement [and] it'll go to court [and] we'll lose." J.A. 2148. DH&S did, in a note to its 1984 audit report, make reference to the fact that the IRS had commenced its own audit of PTL, although *no specific mention was made of the issue of private inurement.*[3]

(*Id.* at 981, 982, 983, 984.) This is only a tiny part of the evidence of DH&S's primary wrongdoing.

The district court similarly found the case against DH&S on these facts to be a "relatively close and difficult" case on fraud theories (common law fraud, RICO, and timeshare laws), as the Fourth Circuit noted twice. (*Id.* at 984, 985.) Before entering the directed verdict on the ground that Lifetime Partnerships were

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[3]That note was manipulative and deceptive, because it neither conveyed the very non-routine and menacing focus of the IRS audit, nor the potential "loss of tax exempt status [that] threatened to create huge tax liabilities and to leave PTL unable to attract the deductible contributions which were its lifeblood."

not securities, the district court ruled that the securities primary liability claims against DH&S otherwise stated a claim, and were sufficient to weather summary judgment and the motion for directed verdict.

DH&S, when it certified PTL's financial statements, did so fraudulently and knowingly participated in Bakker's fraud, as DH&S's own workpapers showed:

a. Administering the Secret Payroll Account for Massive Looting. DH&S admitted that "executive payroll checks were written by DH&S based upon mgmt's authorization to protect the confidentiality of payroll amounts"--which was indeed essential to keep Bakker's looting secret and possible. DH&S prepared the checks for Bakker to pocket up to $1.9 million a year, and hid its $92,820 charge by naming it a "tax service." DH&S also prepared Bakker's personal tax returns, and was paid for a special study of his private inurement. DH&S continued this "tax service" until mid-1985, when PTL was insolvent and Partnerships were grossly oversold.

b. Covering Up PTL's Tax Exemption Loss. DH&S admitted (in its workpapers) knowing that "IRS exam will find private inurement and it'll go to court, [and] we'll lose." Yet DH&S drafted a footnote to the 1994 audited financial statements that misrepresented the IRS audit, and withheld a qualification about PTL's impending loss of tax exemption. Yet DH&S admitted knowing the "probability of an unasserted claim against PTL's tax-exempt status" and the "likelihood that the IRS may raise an issue as to private inurement" (as it

admitted in workpapers). DH&S in fact wrote Bakker's checks, prepared his tax returns, and did a private inurement study, before its 1984 or 1983 certifications. DH&S similarly concealed in the 1983 certification its knowledge of an IRS audit and that "one of the primary issues of the audit [was] private inurement."

c. Covering Up PTL's Insolvency (Going Concern Problem). DH&S admits that it initially qualified its certification for "whether PTL will be able to continue as a `going concern' based on current assets of only 8.6 million against 28.5 million in current liabilities," and "chang[ed] the opinion" and destroyed that qualification under PTL pressure. Yet looking at the same records, PTL's vice president of finance issued weekly warnings that "[e]ach day brings us into a deeper crisis."

d. Covering Up Diversion of Lifetime Partner Funds. DH&S covered up the diversion of well over half of the Lifetime Partner investments from hotel construction to Bakker's compensation and other unauthorized purposes, by secretly preparing the checks for Bakker and not disclosing the massive transfers.

e. Covering Up Violations of Securities Laws. DH&S hosted a meeting to plan the first Lifetime Partnership soliciation, where it heard PTL's tax counsel note that the "obvious legal issues involved are . . . [t]he possibility of a securities offering," and heard him advise against mailing the Partnership solicitation. DH&S had a copy with promises that "[y]ou cannot find a better investment opportunity anywhere," and

that the value was "almost $20,000!" DH&S ignored its duty to inquire, and covered up the violations.

f. Covering Up Oversales of Lifetime Partnerships. DH&S knew about the flagrant oversales, and covered them up, as ample evidence shows.

DH&S's false certification of PTL's financial statements was essential for Bakker's fraud to succeed, because Bakker advertised to the Lifetime Partners that PTL was financially squeaky clean because "[w]e have been audited by Deloitte Haskins & Sells for many years" and "[o]ne of the big audit firms in America is in here all the time," in television, newspapers, and mailings.

4. Other Circuits Find Primary Liability in Such Acts

DH&S's actions are more manipulative and deceptive than those of other auditors whose cases have involved primary violations of securities laws.[4]

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[4] *E.g.*, Bradford-White Corp. v. Ernst & Whinney, 872 F. 2d 1153, 1159 (3d Cir. 1989) ("The crux of this finding of liability is that Ernst & Whinney failed to conduct an audit of Jackson which complied with GAAS but that it nonetheless represented [certified] that it had complied with GAAS."); Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1043, 1044 (11th Cir. 1986) (primary liability potential from audits and nonaudit services by not "tak[ing] reasonable steps to correct misstatements they have discovered in previous financial statements," and not "disclos[ing] actual knowledge of fraud"); James v. Meinke, 778 F.2d 200, 202 (5th Cir. 1985) (primary liability verdict affirmed under Rule 10b-5 when accountant "did not fully disclose Bratton's financial status and prospects before they bought their stock"); United States v. Weiner, 578 F.2d 757, 782, 784 (9th

As indicated in these cases, DH&S had a duty not to issue a false or misleading certification, in certifying PTL's financial statements. *Accord, United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984) ("By certifying the public reports . . ., the independent auditor assumes a public responsibility . . . . This 'public watchdog function' . . . requires complete fidelity to the public trust."); *United States v. Benjamin*, 328 F.2d at 863 (2d Cir. 1964) ("In our complex society the accountant's certificate . . . can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar.").

B. Negligence Claims against Directors and Officers Who Permit Securities Violations Are Not Barred by *Central Bank of Denver*, but the Fourth Circuit Grossly Overextended *Central Bank* To Ignore Claims against PTL's Directors and Officers Who Permitted § 10(b) Violations.

Cir. 1978), *cert. denied*, 439 U.S. 981 (1979) (auditors "knowingly and willfully made or caused to be made false and misleading statements in the auditor's report"; "The overwhelming scope of the fraud, its often complex but sometimes very simple mechanisms, and the failure of the auditors to find in any of the suspicious procedures cause to dig further into Equity Funding's financial records system all lead to the inescapable conclusion that defendants [auditors] were involved."); United States v. Natelli, 527 F.2d 311, 323-24, 319, 321 (2d Cir. 1975) (auditor "culpable if he acted in `reckless disregard' of the facts or if he `deliberately closed his eyes'" to fraud, or had a "failure to make open disclosure" and "concealment of retroactive adjustments"); Competitive Associates, Inc. v. Laventhol, Krekstein, Horwath & Horwath, 516 F.2d 811, 813 (2d Cir. 1975) (auditor "knowingly and with intent to defraud certified these statements in order to facilitate, aid and abet Yamada's scheme").

The *Central Bank* decision similarly does not eliminate negligence claims against directors and officers for permitting securities fraud. Thus, the gross negligence claims against PTL directors and officers for permitting these securities violations, and for violating North Carolina securities law, remain viable, were wrongly dismissed by the trial court in its directed verdict, and should also go back to trial along with the primary securities claims against Bakker and DH&S. These negligence claims were wrongly struck by the Fourth Circuit opinion under an overextension of *Central Bank,* or wrongly ignored.

These gross negligence claims are vitally important to the Lifetime Partner class, because they allow recovery for the victims from the insurers of much of the $160,000,000 lost by the Lifetime Partners.[5]

1. Negligence Liability of Directors and Officers for Permitting Securities Violations Was Alleged

Gross negligence claims for permitting securities violations were made against Bakker, Taggart, and Cortese in the restated amended complaint and in the second amendment (quoted in Appendix V, § 440B).

Negligence in violating the North Carolina securities provision (N.C.G.S. § 78A-8) may be actionable.

[5]The National Union Insurance policy involves approximately $35,000,000, and the Employers Reinsurance policy involves well over $30,000,000, in coverage, which in turn would reduce the exposure for DH&S. *See* National Union Fire Ins. Co. v. Heritage Village Church & Missionary Fellowship, No. C-C-90-150 (W.D.N.C. filed *, 1990); Employers Reinsurance Corp. v. Teague, 972 F.2d 339 (4th Cir. 1992).

The Fourth Circuit noted the issue is unresolved. (35 F.3d at 992.) That claim comes within the negligence allegations against Bakker, Taggart, and Cortese.

2. Central Bank Permitted D&O Negligence Liability.

Central Bank does not conflict with the liability of directors and officers for negligence in, among other things, permitting securities violations. The Fourth Circuit overextended it, or ignored the claims.

3. The Directors' and Officers' Acts Support Gross Negligence Liability.

PTL officers were warned (in DH&S's offices), before the first Lifetime Partnership promotion was mailed, that the "obvious legal issues involved are . . . [t]he possibility of a securities offering." They then were warned not to mail the Lifetime Partnership promotion, by PTL's general legal counsel. They negligently supervised the largest securities violation in the history of religious organizations.

Bakker, after that warning, sold over $160,000,000 of Lifetime Partnerships in violation of securities law

Taggart thereafter cancelled a halt to oversales of Lifetime Partnership securities, and was aware of the oversales. He was the second-highest paid official at PTL, and the third-ranking officer of PTL as "Vice President of Executive Offices."

Cortese as well as Taggart received the promotional materials for Lifetime Partnerships, which promised that "[y]ou cannot find a better investment opportunity anywhere . . . . worth almost $20,000" and that Towers

Partnerships were "literally worth hundreds of thousands of dollars." She did nothing to stop, or ask about, securities sales, or securities violations by oversales (despite knowing the limits),[6] even though she received PTL's financial statements and received $15,000 a year as a director. The trial judge's conclusion at the time (though he found Cortese's nonliability more compelling six months after trial) was:

> It may be a close case whether she is guilty of gross negligence or not. . . .
> The evidence, I believe, shows, if anyone wishes to find it, that it would support a finding of ordinary negligence.

The bankruptcy judge similarly found Cortese and the other directors grossly negligent. *Benton v. Bakker,* 92 B.R. 1000, 1016 (D.S.C. Bkry. 1988).

The district court similarly ruled that the negligence claims for permitting securities violations stated a claim, and were sufficient to weather summary judgment and the motion for directed verdict.

C. *Central Bank of Denver* Should Not Be Made Retroactive, in View of the Circuits' Unanimity Beforehand, but the Fourth Circuit Made *Central Bank* Retroactive Even though It Was Unforeseeable.

The uniform decisions of all eleven circuits on Section 10(b) aiding and abetting were overturned by *Central Bank* in April 1994. Thus, the rule in

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[6] She similarly did nothing to stop, or ask about, mind-boggling compensation, tax exemption loss, or fund diversions. She approved $3.4 million in bonuses to the Bakkers.

Central Bank could not be reasonably foreseen. This case was filed six years *before* that, with aiding and abetting claims along with primary liability claims, and went to trial four years before *Central Bank*, when all circuits supported aiding and abetting liability. Thus, *Central Bank* should not apply retroactively to this and similar cases.

II. THE FOURTH CIRCUIT DECISION CONFLICTS WITH THIS COURT AND WITH OTHER CIRCUITS ON ACCOUNTANT PRIMARY LIABILITY, BY IGNORING FALSE CERTIFICATION OF PTL'S FINANCIAL STATEMENTS, AND BY IMPLYING IMMUNITY FOR ACCOUNTING FIRMS.

This Court has not fully addressed an accountant's liability for falsely certifying financial statements. However, it has acknowledged the auditor's high responsibility as a "public responsibility" and "'public watchdog' function," and has given reasons against "insulat[ion] from disclosure" that equally apply against insulation from liability. The Fourth Circuit, to the contrary, implied auditor immunity.

> By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure [pursuant to an IRS summons] a certified public accountant's inter-

> pretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.

United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984).[7]

This case against the independent auditors (DH&S) was a "relatively close and difficult" case on the non-securities fraud theories (RICO, common law fraud, and timeshare laws), as the district court found at the end of a seven week trial, and as the Fourth Circuit twice noted. (35 F.3d at 985, 996.) "[T]he record contains evidence which supports plaintiffs' various theories of aiding and abetting liability on the part of DH&S," as the Fourth Circuit acknowledged. (*Id.* at 994.) The jury would likely have found DH&S liable if the district judge had not erred on several points, and those errors would have been reversed if the Fourth Circuit had not treated the auditors as effectively immune from the $129,000,000 liability.

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[7] *See also* AU 110.01 (giving a correct certification opinion is the "objective of the ordinary examination of financial statements by the independent auditor"); AU 410.01 (giving such an opinion is the "first standard of reporting" by auditors); AU 509.09(c) (auditor may not give the usual certification if the "financial statements are affected by a departure from a generally accepted accounting principle"); AU 509.15 (instead "should express a qualified or an adverse opinion"); AU 509.17 ("should express a qualified or an adverse opinion" if there is "inadequate disclosure"). AU refers to Auditing Standards Board, *Codification of Statements on Auditing Standards.*

A. Securities Immunity for Auditors' Primary Violations Is Contrary to *Arthur Young, Reves I,* and *Central Bank of Denver,* but the Fourth Circuit Ignored the Auditors' False Certification of PTL's Financial Statements and Implied Immunity for Accounting Firms.

1. Effective Immunization of the Auditors

The trial court dismissed all securities claims on the erroneous ground that Lifetime Partnerships could not be securities, and thereby dismissed the primary liability claims against DH&S, as discussed in I *supra.* The Fourth Circuit reversed the former, but either upheld or ignored the latter, which had the effect of immunizing the auditors from securities liability for their primary violations.

2. Conflict with This Court and Other Circuits

That Fourth Circuit approach conflicts with *Arthur Young & Co.*, which implied auditor liability for falsely certifying financial statements, and *Reves v. Ernst & Young,* 494 U.S. 56 (1990), which upheld auditor liability for false certification. It also comflicts with *Central Bank of Denver,* which said that an "accountant . . . who . . . makes a material misstatement (or omission) . . . may be liable as a primary violator under 10b-5." The Fourth Circuit approach also conflicts with the decisions of other circuits, which hold auditors liable for primary securities violations (citations in I.A.4 *supra*). DH&S's false certification of PTL's financial statements and other primary acts were comparable to the primary secu-

rities violations in those cases.

B. RICO Immunity for Auditors' Violations of RICO Is Contrary to that Statute and to the *Reves II* Decision, but the Fourth Circuit Ignored the Auditors' False Certification of PTL's Financial Statements and Implied Immunity for Accounting Firms.

1. Effective Immunization of the Auditors

The Fourth Circuit upheld the trial court's instructions that the auditors, to be liable under *civil* RICO, must have had "specific *criminal* intent" as aiders and abettors or "*criminal* intent as conspirators. The Fourth Circuit also upheld criminal requirements for the primary RICO violators, and a stock ownership requirement that could not be met by PTL insiders. Those requirements effectively immunized the auditors. They are discussed in III *supra*.

2. Conflict with This Court and Other Circuits

That Fourth Circuit approach conflicts with *Arthur Young & Co.*, which implied accountant liability for falsely certifying financial statements, and with *Reves II,* which held auditors potentially subject to RICO liability. *"'[O]utsiders'* may be liable under § 1962(c) if they are 'associated with' an enterprise and participate in the conduct of its affairs," and "the 'operation or management' test that applies under subsection (c) in no way limits the application of subsections (a) and (b) to *'outsiders.'"* *Reves v. Ernst & Young*, 113 S.Ct.1163, 1173 (1993). It also conflicts with *Sedima* and other recent RICO decisions, which strike down judicial hurdles to RICO

verdicts. *E.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). The Fourth Circuit approach also conflicts with the decisions of other circuits, holding auditors liable for RICO violations.[8]

C. Common Law Fraud Immunity for Auditors' Violations and Aiding and Abetting Is Contrary to *Arthur Young* and to State Statutes, but the Fourth Circuit Ignored the Auditors' False Certification of PTL's Financial Statements and Implied Immunity for Accounting Firms.

1. Effective Immunization of the Auditors

The Fourth Circuit upheld the trial court's jury instructions that (repeatedly) gave the statute of limitations as an absolute 3-year period without any equitable tolling (tolling should have occurred, N.C.G.S. § 1-52(9), because fraud prevented discovery of Bakker's and DH&S's wrongdoing). The appeals court's only expla-

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[8] *E.g.*, James v. Meinke, 778 F.2d 200, 202 (5th Cir. 1985) (jury verdict affirmed convicting accountant of RICO and Rule 10b-5 primary violations when "did not fully disclose Bratton's financial status and prospects before they bought their stock"); Schacht v. Brown, 711 F.2d 1343, 1345 (7th Cir. 1983) (RICO claim stated against accounting firm that "knew of Reserve's insolvency" and "prepared unqualified opinion letters"); *see* Emrich v. Touche Ross & Co., 846 F.2d 1190 (9th Cir. 1988) (RICO claims stated against auditor); Penturelli v. Spector, Cohen, Gadon & Rosen, 779 F.2d 160 (3d Cir. 1985) (same); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982) (same in connection with failed nonprofit retirement village interest); *see* Bank of America National Trust v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986) (RICO claim stated against accountant for "prepar[ing] false financial statements and reports") (modified in *Reves*).

nation was the cryptic conclusion without any citation that "[t]he record refutes this argument,"[9] and the trial court had actually acknowledged the error and agreed to reinstruct the jury (then declined to). The appellate court also conceded that a statute of limitations instruction was totally unnecessary, because "no Lifetime Partners were aware of PTL's financial difficulties" until within 3 years of filing suit, and yet without explanation summarily found "no prejudicial error." (35 F.3d at 994n.22.) The absolute 3-year period left Bakker on the hook (he continued running PTL until 1/2-year before suit was filed), but let DH&S off the hook (it completed its audit just over 3 years before suit was filed).[10] The jury predictably found Bakker liable for $129,000,000, but DH&S not liable for fraud, taking the instruction literally. This effectively immunized DH&S from fraud liability. Yet the Fourth Circuit recognized "the record contains evidence

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[9]The jury clearly applied the 3 year date before suit as an absolute bar, because it subtracted from the total Lifetime Partner losses ($161,482,763) the Lifetime Partnership sales as of the 3 year date before suit was filed ($31,815,523 on November 17, 1984), and set damages at $129,667,240. However, with equitable tolling, that $31,815,523 should have been included, and DH&S (which had finished its audit before that 3-year date) should have been liable.

[10]The instructions similarly let DH&S off the NCRICO hook by erroneously requiring not just that one defendant commit an act after October 1986, but that each defendant do so. N.C.G.S. § 75D-3(b). They also wrongly used the reasonable doubt standard for NCRICO, and wrongly used the absolute 3-year bar for the time share claims.

which supports plaintiffs' various theories of aiding and abetting liability on the part of DH&S." (*Id.* at 994.)[11]

2. Conflict with This Court and Other Circuits

That Fourth Circuit immunity conflicts with this Court's statement on auditor responsibilities in *Arthur Young,* and with other circuits' decisions on auditor liability for fraud. DH&S's actions compare darkly with those of other auditors that have committed primary violations of fraud laws.[12]

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[11] The Fourth Circuit's straining to immunize auditors is also evident in its finding that Lifetime Partnerships did not meet the definition of a "vacation time sharing plan" under South Carolina law, although the definition was otherwise a perfect match, for the sole reason that one or more Lifetime Partners might not live at least a year. (Two of 160,000 died during the first year of the program.) 35 F.3d at 993. Thus, there was no timeshare fraud, or DH&S fraud liability.

[12] *E.g.*, North River Insurance Co. v. Stefanou, 831 F.2d 484, 485-86 (4th Cir. 1987) (auditor's fraud and conspiracy to create fraudulent tax deductions); Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1043, 1044 (11th Cir. 1986) ("Such a duty may exist `where the law imposes special obligations, as for auditors, . . . depending on the circumstances of the case.'"; "Standing idly by while knowing one's good name is being used to perpetuate a fraud is inherently misleading" "where the issue is disclosure of actual knowledge of fraud."; "`duty is to safeguard the public interest,' to disclose fraud in this type of circumstance") (primary fraud liability); Bank of America National Trust v. Touche Ross & Co., 782 F. 2d 966, 970 (11th Cir. 1986) ("assist[ed] in the preparation and dissemination of false financial statements") (primary RICO liability); Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1313 (9th Cir. 1982) (fraud); United States v. Natelli, 527 F.2d 311,

III. THE FOURTH CIRCUIT DECISION CONFLICTS WITH THIS COURT AND WITH OTHER CIRCUITS ON CIVIL RICO LIABILITY, BY GUTTING THE CIVIL-CRIMINAL DISTINCTION, AND BY IGNORING THIS COURT'S RECENT DECISIONS ON THE ACQUISITION OF INTEREST AND RELIANCE STANDARDS, LIFTING THEM TO UNREACHABLE LEVELS.

This Court has never fully delineated what portions of civil RICO must remain civil, not criminal. However, it has held that civil RICO does not require organized crime, criminal convictions, or crimes.

The Fourth Circuit upheld, in analysis limited to a footnote, the trial court heavily peppering the *civil* RICO jury instructions with *criminal* language, and requiring *"stock or ownership equity"* for § 1962(b)-(c) liability in a nonprofit organization. These improper constructions frustrate civil RICO.

323-24, 319, 321 (2d Cir. 1975) ("culpable if ... `deliberately closed his eyes'" to fraud, or had a "failure to make open disclosure" and "concealment of retroactive adjustments"); Competitive Associates, Inc. v. Laventhol, Krekstein, Horwath & Horwath, 516 F.2d 811, 813 (2d Cir. 1975) ("knowingly and with intent to defraud certified these statements in order to facilitate, aid and abet Yamada's scheme"); United States v. Simon, 425 F.2d 796, 806-07 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970) ("If certification does not at least imply that the corporation has not been looted by insiders so far as the accountants know, . . . it would mean nothing") (primary fraud liability); United States v. Benjamin, 328 F.2d 854, 863 (2d Cir.), *cert. denied* sub nom. Howard v. United States, 377 U.S. 953 (1964) ("members of these ancient professions should not be able to escape criminal liability on a plea of ignorance when they shut their eyes to what was plainly to be seen") (primary fraud); United States v. White, 124 F.2d 181 (2d Cir.1941).

A. Crimes and Criminal Intent Are Not Required To Violate Civil RICO, as This Court Said in *Tafflin* and Intimated in *Sedima* in Questioning Whether Criminal Burdens Apply, but the Fourth Circuit Upheld *Criminal* Standards for *Civil* RICO.

The jury instructions in this civil RICO case required proof of criminal acts, criminal intent, and the criminal reasonable doubt standard. The Fourth Circuit upheld the instructions. The jury instructions consistently described the necessary racketeering acts as "crimes" and "criminal" acts. The same was true of the North Carolina RICO instructions. For example, the following instruction was read and then repeated:

> Racketeering acts or predicate acts are **crimes**, and in the RICO statute, Congress listed a number of times what can be predicate acts. The list includes both Federal law **crimes** and state law **crimes**. Congress deliberately made the list broad with the intent of including all kinds of **criminal** activity in which organized **crime** was or could be involved. The listed **crimes** are referred to as predicate acts because the RICO violation is predicated or dependent upon proof that someone committed these **crimes**.

The instructions required criminal intent: "specific intent to defraud," a primary violator to be "convicted" and "guilty," "criminal intent" for conspirators, "specific intent" for aiders and abettors to be liable, and "specific criminal intent" for aiders and abettors under state RICO. The instructions used the criminal aiding and abetting standard, and required proof beyond a reasonable doubt for state RICO.

1. No Crime Requirement under Federal Civil RICO.

a. No Criminal Claim. This Court recognized that "civil" RICO claims do not require "crimes": "civil RICO claims are not `offenses against the laws of the United States,' § 3231, and do not result in the imposition of criminal sanctions." *Tafflin v. Levitt,* 493 U.S. 455, 464 (1990). "The word `conviction' does not appear in any relevant portion of the statute." *Sedima, S.P.R.L. v. Imrex Corp.,* 473 U.S. 479, 488 (1985). This Court also differentiated between "criminal purposes" and "legitimate business" to say that the RICO enterprise need not be criminal and could be non-criminal. *H.J., Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 242-43 (1989). And the Court rejected arguments that civil RICO liability requires organized crime[13] or criminal conviction.[14]

The text of RICO itself, as a statute with civil and criminal uses, carefully refers to "racketeering activity," "acts", and "predicate acts" rather than "crimes."[15]

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[13]492 U.S. at 236-37, 244-45; United States v. Turkette, 452 U.S. 576, 587 (1981). The Court's reasons for rejecting an organized crime requirement, 492 U.S. at 244, apply equally to any crime requirement.

[14]Sedima, 473 U.S. at 493, *rev'g,* 741 F.2d 482 (2d Cir. 1984). The Court's reasons for rejecting a conviction requirement, 473 U.S. at 488, apply equally to a crime requirement.

[15]18 U.S.C. §§ 1961(1) (definition of racketeering activity), 1961(5) (definition of

b. No Criminal Standard of Proof. Moreover, the RICO standard of proof is not the criminal law reasonable doubt test, but the civil preponderance test:

> In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a *preponderance standard.* [Citations omitted.] There is no indication that Congress sought to depart from this general principle here. . . . But we need not decide the standard of proof issue today.

Sedima, 473 U.S. at 491. All circuits agree.

c. No Criminal Intent. Civil RICO does not require criminal intent; "That the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards." *Id.*

2. No Crime Requirement under North Carolina Civil RICO.

The same is true under North Carolina RICO (NCRICO), which expressly says it "constitutes a civil offense only and *is not a crime*," and does not require "criminal intent." N.C.G.S. §§ 75D-4(b).

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pattern), 1962 (prohibited activities), 1964(c) (civil action). *Accord*, Sedima, S.P.R.L. v. Imrex Corp., 473 U.S. at 488 ("[Section 1964(c)] refers only to a failure to adhere to legal requirements [a violation]. . . . Section 1962 renders certain conduct `unlawful; § 1963 and § 1964 impose consequences, criminal and civil, for `violations' of § 1962."); Blakey & Cessar, *Equitable Relief Under Civil RICO,* 62 Notre Dame L. Rev. 526, 530 n.14 (1987) (RICO's draftsman) ("Section 1962, in short, states what is `unlawful,' not `criminal.'").

B. Stock Ownership and Management Involvement Are Not Required To Violate Civil RICO § 1962(b), as This Court Has Recently Held, but the Fourth Circuit Upheld Those Requirements, Which Could Never Be Met in a Nonprofit Organization Such as PTL or by Outside Auditors for PTL.

1. No Stock Ownership Requirement for § 1962(b)-(c)

This Court recently held that a "'profit-seeking' entity" is "not required" for RICO liability. *National Organization for Women v. Scheidler,* 510 U.S. ___, 127 L.Ed.2d 99, 109 (1994). This Court also has defined "interest" broadly under RICO § 1962(b). *Russello v. United States,* 464 U.S. 16, 21 (1983).[16] The trial court and Fourth Circuit contradicted that by a "stock ownership" requirement for § 1962(b)-(c) liability.

The jury instructions said that employment could never constitute the "interest" in the enterprise that RICO and NCRICO require, and that only stock ownership (which was not possible in connection with PTL) could meet the "interest" requirement of RICO §§ 1962(b)-(c). RICO liability could be evaded if the violator were smart enough to work through a nonprofit organization, as Bakker did with PTL. The instructions let Bakker off the RICO and NCRICO hook, and without a primary violator they let DH&S and Taggart off the hook too. Also, the lower court's instruction did not limit itself to § 1962(b), and left the confusing impression

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[16] *Accord,* Riverwoods Chappaqua Corp. v.Marine Midland Bank, RICO Bus.Dis. Guide §8610 (2d Cir. 1994).

that employment could not constitute any of the prohibited conduct under RICO § 1962(c) either, even though § 1962(c) expressly includes"employ[ment]."

The "stock ownership" requirement conflicts with RICO's text and with the Seventh Circuit. § 1962(b) does not limit itself to "stock or ownership," or disqualify "employment" from the interest "acquire[d] or maintain[ed]." To the contrary, § 1962(b) covers employment by broad reference to "any interest in" and to "control" of the enterprise, as well as by reference to "indirectly." The Seventh Circuit expressly defined "control" in 1962(b) not to require stock ownership. *Sutliff, Inc. v. Donovan Companies,* 727 F.2d 648, 653 (7th Cir. 1984). The other circuits' decisions holding that the "person" need not be different from the "enterprise" under § 1962(a)-(b) are effectively saying the same thing.

The exclusion of nonprofit organizations conflicts with RICO's text and this Court's decision. § 1962 covers nonprofit organizations, because the definition of "enterprise" in § 1961(4) is equally broad, as the Court held in *National Organization for Women.*

2. No Involvement in Management Test for § 1962(c).

The Fourth Circuit upheld these instructions, by incorrectly equating the clear "stock ownership" language with an *unrelated* requirement in the instructions for "involvement in the management and operation of PTL." (35 F.2d at 995 n.23.)

However, that justification contradicted this

Court's pronouncement on § 1962(b) liability, that "the 'operation or management' test that applies under subsection (c) in no way limits the application of subsections (a) and (b) to 'outsiders.'" *Reves v. Ernst & Young*, 113 S.Ct.1163, 1173 (1993). Thus, the Fourth Circuit's only misjustification for the erroneous "stock ownership" requirement under § 1962(b) was an equally erroneous "involvement in management" requirement that hindered § 1962(b) liability.

These points equally apply to NCRICO, which has virtually identical language.

C. Reliance on Each Defrauder Is Not Required to Violate Civil RICO § 1964(c), and Could Not Be Met When Defrauders Act Behind the Scenes, Aid and Abet, or Conspire, but the Fourth Circuit Required Reliance on Not Just One but on Each Participant for RICO Liability.

The Fourth Circuit has read into RICO a requirement for reliance on each participant, not just on the primary wrongdoer. *Brandenberg v. Seidel,* 859 F.2d 1179, 1188 n.10 (4th Cir. 1988) ("such reliance is necessary to establish injury to business or property 'by reason of' a predicate act of mail fraud within the meaning of § 1964(c)"). That is precisely the sort of judicial hurdle to RICO that this Court keeps condemning.

CONCLUSION

Thus, we request that certiorari be granted.

Dated December 23, 1994 and respectfully submitted,

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APPENDIX

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FOURTH CIRCUIT OPINION

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 91-2101, -2120, -2121

[STYLE OMITTED]

(Decided: September 23, 1994)

Affirmed in part; reversed and remanded in part.

Before RUSSELL and HALL, Circuit Judges, and CLARKE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part and reversed and remanded in part by published opinion. Judge DONALD RUSSELL wrote the opinion, in which Judge K.K. HALL and Senior Judge CLARKE joined.

RUSSELL, Circuit Judge:

The plaintiffs, members of a class of approximately 160,000 individuals who purchased "Lifetime Partnerships" from an entity known as "PTL" entitling them to a short stay annually in a hotel at a vacation retreat constructed by PTL, brought the instant suit against numerous defendants alleging common law fraud, federal and state securities fraud, state timeshare fraud, federal and state RICO violations, and negligence, all in

connection with the oversale of PTL Lifetime Partnerships. Plaintiffs proceeded to trial against James O. Bakker ("Bakker"), Deloitte, Haskins & Sells ("DH & S"), Aimee Cortese ("Cortese") and David A. Taggart ("Taggart"). Before the case was sent to the jury, the district court granted defendants' motion for a directed verdict with respect to plaintiffs' securities fraud claims. Following deliberations, the jury found Bakker guilty only of common law fraud. DH & S, Taggart and Cortese were absolved of all liability. The district court entered judgment against Bakker on the common law fraud count for $129,618,000 in compensatory damages and for an additional $129,618,000 in punitive damages. Plaintiffs appeal from the judgments entered against them. Bakker cross-appeals on the ground that the issues of reliance, causation and damages in relation to the adverse fraud verdict should have been handled on an individual class member basis. DH & S and Taggart cross-appeal from the district court's denial of their petition for reimbursement of costs. We reverse the district court's grant of judgment as a matter of law against plaintiffs on their securities fraud claims against Bakker, and otherwise affirm the district court's judgments in all respects.[1]

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[1]Prior to oral argument, DH & S made a motion to supplement the record. That motion is denied.

I.

A.

PTL, which stands for "Praise the Lord" and "People that Love," consists of various nonprofit entities. Bakker was the founder, president, a director, and the spiritual and financial leader of PTL. DH & S, an international accounting firm, provided PTL with independent auditing services in the early 1980's. DH & S's last audit of PTL was completed by October 24, 1984. In addition, during the time that it provided auditing services and for a time thereafter, DH & S administered PTL's "Executive Payroll Account" [*982*] upon which checks transmitting salary and benefits to Bakker and other PTL executives were drawn.

Cortese was the pastor of a small church in New York City. In 1979, a director of PTL, Reverend Richard Dortch ("Dortch"), approached Cortese about the possibility of Cortese joining PTL's board of directors. In 1980, despite her lack of experience with financial matters, Cortese agreed to serve on PTL's board. She remained a board member until 1987.

Taggart held various offices in PTL, including the title of vice-president, but he had few, if any, real management duties. Taggart was primarily Bakker's administrative aide and was not a PTL director.

This case concerns primarily PTL's sale of Lifetime Partnerships ("LTPs").[2] We previously affirmed

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[2]As described just below, PTL offered various

criminal convictions against Bakker arising therefrom. *United States v. Bakker*, 925 F.2d 728 (4th Cir.1991). At the time, we summarized the relevant underlying facts thus:

... [I]n the late 1970s PTL began construction on "Heritage USA," described by PTL officials as a Christian retreat center for families. In 1983, Bakker announced plans to enlarge the center by adding a vacation park, "Heritage Village," that would include the 500-room Grand Hotel. Between 1984 and 1986, [Bakker] announced further proposals to expand the Village by constructing the Towers Hotel, 50 bunkhouses, and several additional facilities.

Bakker planned to finance these projects by selling lifetime partnerships. He offered eleven different partnership programs ranging in cost from $500 to $10,000. Eight of the partnerships promised benefits that included annual lodging in one of the Heritage Village facilities. In January 1984, [Bakker] began using the mail to solicit lifetime partners. Also, from February 1984 through May 1987, Bakker used broadcasts carried on the PTL Television Network and various commercial affiliates to solicit lifetime partners. Many of these partners drew on meager

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"partnerships" which purported to provide to purchasers the right to varying numbers of nights each year at various PTL hotels at Heritage, USA, the vacation retreat constructed by PTL. We refer to all such offerings collectively as LTPs and to purchasers of LTPs as "lifetime partners" or simply as "partners."

incomes to purchase Heritage Village lodging benefits. [Bakker] raised at least $158 million through the sale of approximately 153,000 partnerships with lodging benefits.

Bakker promised television viewers that he would limit the sale of partnerships to ensure that each partner would be able to use the facilities annually. [Bakker], however, oversold the partnerships. He promised, for instance, to limit the sale of Grand Hotel partnerships to 25,000 but actually sold 66,683. In addition, Bakker used relatively few of the funds solicited from the partners to construct promised facilities. In fact, of the proposed Heritage Village facilities, only the Grand Hotel and one bunkhouse were actually completed. Instead, Bakker used partnership funds to pay operating expenses of the PTL and to support a lavish lifestyle.... This combination of overselling partnerships and diverting partnership proceeds meant that the overwhelming majority of the partners never received the lodging benefits Bakker promised them.

925 F.2d at 731-32 (4th Cir. 1991).[3]

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[3]PTL's desire for unbridled growth is captured in the following passage found in a major PTL publication:

> Enlarge your house; build on additions; spread out your home! For you will soon be bursting at the seams ...

Jim & Tammy Bakker, *Jim & Tammy Bakker Present the Ministries of Heritage Village Church* 198 (1986) (quoting Isaiah *54:2).*

Some additional facts will allow for a more complete understanding of the circumstances involved herein. First, when PTL announced the beginning of the LTP program and the construction of the Heritage Grand Hotel in December of 1983, the program was limited to 25,000 subscribers. As of May 31, 1984, the end of the last fiscal year audited by DH & S, approximately 17,000 LTPs had been purchased. In September of 1984, after [*983*] DH & S had completed its audit field work, a PTL vice-president informed DH & S that construction of a second hotel, the Heritage Towers, was planned and that the LTP program was to be expanded so as to increase the maximum number of potential subscribers by 30,000 to a total of 55,000. Upon learning of PTL's contemplated expansion of the LTP program, DH & S added a note, dated October 24, 1984, to the financial statement it had prepared for PTL's 1984 fiscal year; this note detailed the PTL's planned expansion of the LTP program.

Plaintiffs contend that DH & S was aware of, but failed to disclose, oversales of LTPs. The evidence shows that DH & S checked and knew that, with regard to LTP sales, in April of 1984, "$17,000,000 in pledges has been received of which approximately $9,000,000 has been collected," J.A. 2045, and that, in May of 1984, "$22 million [had been] pledged toward [the] Heritage Grand Hotel," J.A. 1978. By the end of the last fiscal

year for which DH & S performed an audit, then, there were no oversales. The evidence also shows that, by August 25, 1984, prior to the completion of DH & S's field audit, LTP payments had grown to $30.7 million, with an additional $15 million more pledged. J.A. 2567. There is no evidence, however, that DH & S was aware of these oversales at the time.

During the 1980's, the PTL board awarded Bakker, his wife, Tammy Faye Bakker ("Tammy"), and Dortch numerous sizeable bonuses. For example, in 1984 Bakker received $640,000; in 1985 he received $450,000; in 1986 he received $600,000; and in 1987 Bakker was given $1,167,605. J.A. 2366. Bakker's benefits also were tremendous. [4] The compensation, bonuses and cash benefits paid to Bakker, Tammy and Dortch all came from the Executive Payroll Account managed, through mid-1985, by DH & S.

The board overwhelmingly approved the compensation for Bakker, Tammy and Dortch. The only exceptions to unanimous votes were an occasional negative vote or abstention cast by directors who were the direct beneficiaries of the board's action, usually Bakker and Dortch.

Although Cortese was a board member, she had little business experience. As a consequence, when issues

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[4] Bakker's extravagant benefits included the use of a luxury parsonage, complete with an air-conditioned treehouse and personal waterslide.

with respect to which she lacked expertise arose, Cortese consulted with other board members including, in particular, Dortch.

During the same period of time in which Bakker, Tammy, and Dortch were receiving large amounts of money from PTL, PTL's vice-president in charge of finance issued repeated warnings of the economic woes which PTL was barely enduring. A January 1984 memorandum informed Bakker that PTL owed $9.3 million on a past due loan and owed a total of $13 million to all creditors. Bakker was admonished to "[c]urtail as much future spending as possible for the next two months ... [because PTL was] not able to make commitments to anyone else." J.A. 1821. A March 1984 memorandum to Dortch stressed the "need to seriously trim our payroll." J.A. 1823. The memorandum continued: "Each day brings us into a deeper crisis." *Id.* A November 1984 memorandum to Bakker stated: "Until contributions come up to the levels of our current operational expenses, it will continue to be necessary to cover operating expenses from the Tower funds." J.A. 1838. Another memorandum later that month stated succinctly: "We are in a very serious cash flow position." J.A. 1840.

A draft of DH & S's audit report for the fiscal year ending May 31, 1984, expressed concern over "whether PTL w[ould] be able to continue as 'a going concern' based on current assets of only [$]8.6 million against [$]28.5 million in current liabilities." J.A.

2046. Such concern, however, was expurgated from the report before its issuance.

As indicated by the excerpt, quoted above, from a PTL internal memorandum, to help meet the demands for cash which PTL was experiencing, Bakker diverted funds earmarked for the construction of facilities for the Lifetime Partners to various operating [*984*] expenses. Yet, despite the dire financial straits in which PTL found itself and the IRS's decision, in late 1983, to audit PTL, Bakker issued to prospective lifetime partners a brochure promoting the LTPs which stated: "You cannot find a better investment opportunity anywhere...." J.A. 2185E. Bakker made similar representations enticing viewers to purchase LTPs on television.

As mentioned above, in late 1983, PTL fell prey to an IRS audit which culminated in PTL being stripped of its tax-exempt status. The IRS took this action in part due to private inurement allocated to Bakker and Tammy. The loss of tax exempt status threatened to create huge tax liabilities and to leave PTL unable to attract the deductible contributions which were its lifeblood.

A DH & S workpaper prepared in relation to DH & S's 1983 six-month review of PTL states: "IRS exam will find private inurement [and] it'll go to court [and] we'll lose." J.A. 2148. DH & S did, in a note to its 1984 audit report, make reference to the fact that the IRS had commenced its own audit of PTL, although no

specific mention was made of the issue of private inurement.

Plaintiffs focus their attention on DH & S and allege that the accounting firm aided and abetted Bakker's claimed frauds in several ways. First, as noted above, plaintiffs argue that DH & S was, in fact, aware of the oversale of LTPs. Second, plaintiffs claim that DH & S had knowledge that PTL was having difficulties in maintaining its solvency but concealed this problem from the partners under pressure from PTL. Third, plaintiffs further argue that DH & S must have had knowledge of the diversion of hotel construction funds because it prepared PTL's checks to pay construction costs. Fourth, plaintiffs contend that DH & S deliberately concealed the likelihood that the IRS would make a finding of private inurement and, as a consequence, strip PTL of its tax-exempt status. Last, plaintiffs urge that DH & S must have been aware of the exorbitant benefits being awarded to Bakker and Dortch by virtue of its administration of PTL's "Executive Payroll Account," yet failed to make any disclosure.

DH & S and Cortese both contend that Bakker and Dortch actively concealed information from PTL's board regarding possible timeshare or securities violations, private inurement concerns, the instability of PTL's tax exempt status, oversales of partnerships, use of partnership funds to pay Bakker's bonuses, and PTL's path to insolvency.

B.

On November 17, 1987, a class of plaintiffs comprised of approximately 160,000 individuals who had purchased the PTL LTPs filed the instant suit. At trial, plaintiffs pursued claims of common law fraud, fraud in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), fraud in violation of the North Carolina Securities Act, N.C. Gen. Stat. §§ 78A-1 to 78A-65, fraud in violation of the South Carolina Timeshare Act ("SCTSA"), S.C.Code Ann. §§ 27-32-10 to 27-32-250, violations of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and of the North Carolina Racketeer Influenced and Corrupt Organizations Act ("NC-RICO"), N.C.Gen.Stat. §§ 75D-1 to 75D-14, and common law negligence. An extensive jury trial was conducted. Near the close of evidence, the district judge granted a directed verdict on the securities fraud claims on the ground that the LTPs were not "securities." The court then submitted the following issues to the jury: (1) whether Bakker violated federal RICO and NC-RICO; (2) whether Taggart or DH & S aided or abetted Bakker's alleged RICO or NC-RICO violations, or conspired to commit such violations; (3) whether Bakker committed common law fraud, and whether DH & S aided and abetted Bakker's alleged common law fraud or conspired to commit such fraud; (4) whether the partnerships were "timeshares" under the SCTSA and whether Bakker had violated the SCTSA,

and whether DH & S had aided and abetted Bakker's alleged violation of SCTSA or conspired to commit such a violation; and (5) whether Taggart or Cortese were grossly negligent.

The jury returned a verdict against Bakker on the common law fraud count. With this one exception, it refused to place liability [*985*] on any defendants for any of the remaining claims. The district court entered judgment accordingly. Plaintiffs filed a motion for a new trial which was denied. *See* Fed.R.Civ.P. 59. DH & S, Taggart and Cortese each moved to assign costs to plaintiffs pursuant to Federal Rule of Civil Procedure 54(d). Despite the verdict in favor of Taggart and DH & S, the trial judge refused to award attorney's fees to either because he considered it to have been a "relatively close and difficult" case as to their liability. J.A. 1815. He did award Cortese attorney's fees because he found the case brought against her "was neither close nor difficult." J.A. 1816.

Plaintiffs appeal, contending that the motion for a new trial was improperly denied because the verdicts handed down by the jury were "against the clear weight of the evidence," *e.g., Poynter ex rel. Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir.1989), for a wide variety of reasons. They also assert that the district court's jury instructions were riddled with errors requiring reversal. Plaintiffs challenge as well the appropriateness of the district court's grant

of a directed verdict on the securities fraud claims and several evidentiary rulings. Bakker has filed a cross-appeal in which he contends that the district court erred in failing to resolve the issues of reliance, causation and damages on an individual class member basis. Taggart and DH & Shave filed a cross-appeal challenging the denial of their motions for costs against the plaintiff class.

II.

Plaintiffs raise a plethora of assignments of error with respect to the various counts they have brought against the defendants. [5] In order to facilitate our discussion, we briefly summarize the standards of

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[5] We would inform counsel for the plaintiff class that the attempts taken to avoid the page limitation set by Federal Rule of Appellate Procedure 28(g) have not gone unnoticed. After the parties were granted a ten-page extension in the length of the briefs from 50 to 60 pages, counsel attempted to evade the 60 page limitation by improperly spacing words and citations, using footnotes for case cites rather than citing cases in the body of the brief, extending pages, and reducing margins. These tactics make it more difficult for this Court to read the plaintiffs' brief and extract the plaintiffs' arguments. Counsel should remember that "[j]udges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991). A client's interests are not furthered by drafting briefs which serve to camouflage legal issues. We would in general admonish all counsel that they, as officers of this Court, have a duty to uphold faithfully the rules of this Court.

review applicable to plaintiffs' assignments of error. We review *de novo* the district court's grant of a motion, pursuant to Federal Rule of Civil Procedure 50, for a directed verdict. *Gairola v. Virginia Dep't of Gen'l Servs.*, 753 F.2d 1281, 1285 (4th Cir.1985). We review the denial of a motion for a new trial pursuant to Federal Rule of Civil Procedure 59 solely for abuse of discretion. *Poynter ex rel. Poynter*, 874 F.2d at 223. In reviewing the adequacy of the district court's choice of jury instructions, we accord the district court much discretion and will not reverse provided that the instructions, taken as a whole, adequately state the controlling law. *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1164 (4th Cir.1986).

III.

We consider first the district court's grant of a directed verdict against plaintiffs as to their securities fraud claim. Plaintiffs urge that the LTPs constituted "securities" within the meaning of the securities acts, and that, as a consequence, the use of fraud in the sale of the LTPs contravened Section 10(b) of the federal Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, as well as the antifraud provision of the North Carolina Securities Act, N.C.Gen.Stat. § 78A-8.

The district court explained its reasons for granting defendants' motion for a directed verdict

thus:

> In *United Housing Foundation v. Forman*, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975), the United States Supreme Court held that "when a purchaser is motivated by a desire to use or consume the item purchased ... the securities laws do not apply." *Id.* at 852-53 [95 S.Ct. at 2060-61] (footnote and citation omitted). [*986*] Under *Forman*, the lifetime partnerships at issue in this case are not securities as a matter of law.

J.A. 1799. The district court cited no facts in support of its conclusion.

"Security," for purposes of federal securities regulation, is defined in Section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1), and in Section 3(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(10). [6] Among the several definitions provided in both sections, securities are defined to encompass "investment contracts." Plaintiffs allege that the LTPs constitute "investment contracts."

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[6] These two sections differ only slightly as far as wording and are generally accepted to be indistinguishable. *E.g., Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 n. 1, 105 S.Ct. 2297, 2301 n. 1, 85 L.Ed.2d 692 (1985). For purposes of this discussion we discuss, without distinguishing, cases addressing the definition of "security" under both acts.

The determination of whether a placement of money constitutes an "investment contract" calls for examining the facts under the test enunciated in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99, 66 S.Ct. 1100, 1103, 90 L.Ed. 1244 (1946). The *Howey* test instructs that an investment contract exists where there has been (i) an investment of money (ii) in a common enterprise (iii) with an expectation of profits garnered "solely" from the efforts of others. [7] At issue here is whether the third prong, that plaintiffs made their investment with an expectation of profits solely from the efforts of others, is met. [8]

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[7] "Despite the restrictive language of the third prong of the test,later courts have explained that a program requiring some effort from the investor may still constitute an 'investment contract,' but the most essential functions or duties must be performed by others and not the investor." *Bailey v. J.W.K. Properties, Inc.*, 904 F.2d 918, 920 (4th Cir.1990).

[8] The parties do not contest that the remaining prongs of the *Howey* test can be met on the record before us. We note, in particular, that, because we find that "profits" under the LTP scheme are distributed *pro rata* to lifetime partners, there is horizontal commonality, *see Revak v. SEC Realty Corp.*, 18 F.3d 81, 87 (2d Cir.1994), in this case. This means that we need not decide here whether some form of vertical commonality, see id. *at 87-88, might satisfy the second prong of the Howey* test.

The fact that there is horizontal commonality here also allows us to distinguish this case from *Revak v. SEC Realty Corp., supra*, and *Wals v. Fox Hills*

The Supreme Court considered *Howey's* third prong in the context of an offering of interests in real estate in *United Housing Foundation v. Forman*, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975). There the Court was faced with the question of "whether shares of stock entitling a purchaser to lease an apartment in ... a state subsidized and supervised nonprofit housing cooperative ... are 'securities'." *Id.* at 840, 95 S.Ct. at 2054. The Court answered this question in the negative, explaining:

> The touchstone [of the *Howey* test] is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. By profits, the Court has meant

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Development Corp., 24 F.3d 1016 (7th Cir.1994), two recent cases where the Second and Seventh Circuits, respectively, found no security arising from the sale of condominium interests because of the absence of commonality. In particular, in *Revak*, there was no rental pool arrangement; that case involved merely the sale of condominiums. For that reason, the Second Circuit found that neither horizontal commonality nor strict vertical commonality, assuming the latter adequate to satisfy *Howey*, was present. Wals *presented the Seventh Circuit with a case in which there were rental pool arrangements. The arrangements, however, were individual contracts between each purchaser and the developer. Because there was no overarching rental pool arrangement according to which profits would be distributed* pro rata *among all purchasers, the Seventh Circuit found that horizontal commonality, which that court reads the Howey* test to require, was not present.

> either capital appreciation resulting from the development of the initial investment ... or a participation in earnings resulting from the use of investors' funds.... In such cases the investor is "attracted solely by the prospects of a return" on his investment. *Howey, supra*, [328 U.S.] at 300 [66 S.Ct. at 1103]. By contrast, when a purchaser is motivated by a desire to use or consume the item purchased--"to occupy the land or to develop it themselves," as the *Howey* Court put it, *ibid.*--the securities laws do not apply.

Id. at 852-53, (citations and footnotes omitted). The Court concluded: "In the present case there can be no doubt that investors were attracted solely by the prospect of acquiring a place to live, and not by financial returns on their investments." *Id.* at 853,. Reasoned the Court:

> Nowhere does the [Investment Bulletin circulated to prospective purchasers] seek to attract investors by the prospect of profits resulting from the efforts of the promoters or third parties. On the contrary, the Bulletin repeatedly emphasizes the "nonprofit" nature of the endeavor. It explains that if rental charges exceed expenses the difference will be returned as a rebate, not invested for profit. It also informs purchasers that they will be unable to resell their apartments at a profit since the apartment must first be

> offered back to [the corporation owning the complex] "at the price ... paid for it." [App. 163a.] In short, neither of the kinds of profits traditionally associated with securities was offered to respondents.

421 U.S. at 854.

Forman, we think, makes clear that, for *Howey*'s third prong to be satisfied, it must be shown (1) that the opportunity provided to offerees tended to induce purchases by emphasizing the possibility of profits, (2) that the profits are offered in the form of capital appreciation or participation in earnings within the meaning of *Howey* and *Forman*, and (3) that the profits offered would be garnered from the efforts of others. We turn, then, to an examination of the facts of this case in light of the third prong of the *Howey* test. [9] We note initially that the third element

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[9] *Forman* does not preclude the possibility that an offering of real estate can, as a matter of law, constitute an offering of a security. *E.g., Hocking v. Dubois*, 885 F.2d 1449 (9th Cir.1989) (en banc), cert. denied, *494 U.S. 1078, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990)*. *Indeed, "[w]hile it is true that ordinary real estate investments, e.g., the purchase of a dwelling, usually are not securities under either Federal or State law, the facts of each case determine whether or not particular instruments are securities." Kosnoski v. Bruce*, 669 F.2d 944, 946 n. 3 (4th Cir.), *cert. denied*, 459 U.S. 832, 103 S.Ct. 72, 74 L.Ed.2d 71 (1982).

We think that the same can be said of the offering of a

delineated above, that is, that the profits offered are garnered from the efforts of others, is not at issue here, *i.e.*, appellees do not dispute that, if there are profits here within the meaning of *Howey* and *Forman* and if offerees would reasonably have been induced to purchase LTPs based upon promises of profit, *Howey*'s third prong is met. We therefore need only

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timeshare. *See* Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 1.5, at 30 (2d ed.1990) ("the currently fashionable marketing of real estate interests through time-share or shared equity programs raises securities law issues because of the possibility of finding an investment contract"); *cf. State v. Shade*, 104 N.M. 710, 726 P.2d 864, 869-71 (Ct.App. 1986) (finding that timeshares can be securities under New Mexico securities law which employs the *Howey* test), *writ quashed sub nom. Vincent v. State*, 104 N.M. 702, 726 P.2d 856 (1986), *overruled on unrelated grounds, State v. Olguin*, --- N.M. ----, 879 P.2d 92 (Ct.App. 1994), *cert. granted*, --- N.M. ----, 879 P.2d 91 (1994). (Our use of the term "timeshares" to describe the LTPs at issue here in no way reflects upon the question of whether they qualify as "vacation time sharing plans" as that term is used in the SCTSA. Indeed, we conclude below that the LTPs are not subject to regulation under the SCTSA. *See post*, at 992-94.)

The district court therefore erred in failing to consider the specific facts presented before granting the appellees' motion for a directed verdict. "An action [under the securities laws] should not be dismissed without an exploration of [the promotional] materials where ... the plaintiffs reasonably allege the existence of investment intent and common enterprise and where nothing in the complaint precludes the finding of a security." *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1040 (10th Cir.1980).

consider the first two elements delineated above.

We first observe that the promotional materials circulated by PTL represented that the value of the privileges lifetime partners would receive far exceeded the $1,000 LTP purchase price. We note, in particular, that letters signed by Bakker, promoting the LTPs, state: "You cannot find a better investment opportunity anywhere--you can actually save thousands of dollars during your lifetime with your one-time investment of $1,000 in the ministry of PTL." J.A. 2178. Further, a brochure designed to promote certain LTPs states:

[*988*] There has never been a better value for your investment in the ministry of PTL. For a one-time gift of $1,000 you will be able to stay free for 4 days and 3 nights, every year, for the rest of your life, in the Heritage Grand Hotel!

Think of the thousands of dollars you will save during your lifetime!

According to the current rate of inflation, if you use your PTL Lifetime Partner membership for 40 years, the gift value of your room at the Heritage Grand Hotel could be worth almost $20,000! You will not be able to find a better investment opportunity anywhere!

J.A. 2185E (footnote omitted[10]). Later in the same

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[10]The footnote further emphasizes the economic aspect of the LTPs, stating:

brochure, it is cautioned: "A maximum of 50% of Heritage Grand Hotel rooms will be available at any given time for Lifetime Partners, allowing for proper hotel maintenance and operations." J.A. 2185H. Other brochures contain similar representations, and Bakker made similar representations on his television program.[11]

These promotional materials can be read to suggest that LTP purchasers would receive an economic benefit in the form of discounted lodging privileges at Heritage USA facilities. It can be concluded, moreover, that PTL could offer this benefit by virtue of its operation, at regular prices, of the facilities not occupied by lifetime partners. This conclusion is

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> Based on estimated room rates and the average rate of inflation, the equivalent costs for a Lifetime Partner who stays in the Heritage Grand Hotel 3 nights, every year, for 40 years, would be approximately $19,500.

J.A. 2185E n.*.

[11] For example, on a January 22, 1986, broadcast, Bakker explained:

> Do you know, when somebody found out I was offering $1,000 for seven days and six nights every year, do you know what they [sic] said? You couldn't rent that suite for $1,000 a night for one night, is what it would rent for in a good hotel. So, that means, it is worth $7,000 or $6,000 just for the first week you stay in it.

Tr. 2814.

supported by the fact that at least 50% of such facilities were reserved for regular patrons in order that "proper hotel maintenance and operations" might be maintained.

Appellees urge that members of the plaintiff class who testified at trial indicated that, despite the foregoing statements in the materials promoting the LTPs, they purchased LTPs with personal use, not profit, as the central motivation. However, even granting appellees' characterization of the testimony of these witnesses, such testimony simply cannot be dispositive in the face of evidence that the promoter of the scheme in question marketed the scheme by emphasizing the potential for profit. Indeed, the Court in *Forman* focused not on the testimony of purchasers of cooperative apartments, but on whether the marketing approach adopted by the sellers was likely to induce purchasers interested in turning a profit.[12] 421 U.S. at [*989*] 853-58, 95 S.Ct.

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[12]It would make little sense for the existence of a "security" to turn solely on whether those who actually invest do so without regard to profit. Such a rule would be highly impractical. Would the existence of a "security" change according to each purchaser? If not, how many, or what percentage of, purchasers would have to have made their investments with an eye toward profits in order for there to be "securities"? Finally, how could the SEC be expected to regulate effectively where the existence of a "security" turns not on how and to whom an investment opportunity is offered, but only on those who ultimately undertake such an investment?

at 2061-63; *see Rice v. Branigar Org., Inc.*, 922 F.2d 788, 790 (11th Cir.1991)[13] ("In addition to

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We note that such a rule seems inconsistent with the Supreme Court's holding in *SEC v. Ralston Purina Co.*, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953). There, the Court was faced with the claim by Ralston Purina Co. that an offering of company stock made to its employees was exempt under what is now Section 4(2) of the Securities Act of 1933, 15 U.S.C. § 77d(2), pursuant to which "transactions by an issuer not involving any public offering" are exempt from regulation. Held the Court: "The focus of inquiry [as to whether an offering is public] should be on the need of the *offerees* for the protections afforded by registration." *Id.* at 127, 73 S.Ct. at 985 (emphasis added). The Court concluded that Ralston Purina Co. could not demonstrate that all the employees to whom it had offered stock had access to enough information about the company that it could be concluded that they were not in need of "the protections afforded by registration." Importantly, the Court did *not* look solely to those employees who, in fact, accepted the offer and purchased stock. This holding seems inconsistent with appellees' position: adoption of a test for the existence of a 'security' which looked only to actual purchasers would seem to undermine the Supreme Court's holding in *Ralston Purina Co.*

[13] Appellees rely heavily upon the Eleventh Circuit's decision in *Rice*. There, Justice Powell, writing for the court, held that sales of lots in a residential housing development were not sales of "securities." Appellees make particular reference to the following statement by the court in *Rice*:

> We believe that people buy houses and lots in a beach-club development primarily to use them, not to derive profits from the entrepreneurial efforts of the developers.... The appellants have not offered any evidence to show that the majority or

looking at the motivations of the purchasers, the Supreme Court also has looked to the emphasis provided in the promotional material to determine whether the sale of something is a sale of 'securities' for the

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> even a fair number of the buyers bought houses or lots as an investment.

922 F.2d at 790-91 (citation omitted). Appellees argue that, here, appellants have similarly failed to provide evidence that any class members purchased LTPs as investments.

Appellees' argument ignores the Eleventh Circuit's observation (one that, as noted in the text, we share) that, "[i]n addition to looking at the motivations of the purchasers, the Supreme Court also has looked to the emphasis provided in the promotional material to determine whether the sale of something is a sale of 'securities' for the purpose of federal securities law." 922 F.2d at 790. On this basis, the Eleventh Circuit relied, in support of its holding that no security was present, upon the fact that, in the case before it,

> the promotional materials published to sell the lots at the Landings do not emphasize the investment value of the lots. Of the several marketing items introduced into evidence, there was only one passing reference to buying the property as an investment. The overall emphasis in the promotional material was clearly placed on enjoying the beauty of the island and the amenities of the club and community.

922 F.2d at 791 (citations omitted). The same cannot be said here. As described above, the promotional materials circulated by PTL cannot be said to have focused their emphasis clearly away from the profit aspects of the LTPs. We conclude that *Rice* is factually distinguishable from the case at bar.

purpose of federal securities law."); *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1039-40 (10th Cir.1980) ("Promotional materials, merchandising approaches, oral assurances and contractual agreements were considered in testing the nature of the product in virtually every relevant investment contract case."). In short, "[i]n the present case," we *can and do doubt* whether "investors were attracted solely by the prospect of acquiring a [hotel room to use], and not by financial returns on their investments." *Forman*, 421 U.S. at 853, 95 S.Ct. at 2061.

We conclude, then, that the promotional materials used to market the LTPs can be seen as emphasizing the profit potential of the LTPs. The materials not only speak generally of the LTPs as "investment[s]," but also offer specific calculations of the true value of the LTPs as compared to their purchase price. The materials also allow the reader to infer that the value of the LTPs was enhanced by virtue of the commercial activities of the PTL facilities in catering to patrons paying full price. Moreover, it is clear and, as noted above, undisputed, that this benefit arises from the managerial efforts of others.

For *Howey*'s third prong to be satisfied, the benefit available to lifetime partners must arise either as capital appreciation or as participation in earnings. We believe that the record before us allows for the conclusion that the benefit in this case arises as capital appreciation. Under the LTP scheme, it

seems that the value of the rights to use the various Heritage, USA, facilities would be enhanced, and therefore capital appreciation might accrue, by virtue of the regular commercial operations of half of all the facilities reserved by regular patrons paying full price for their accommodations.

Appellees argue that the LTPs are nontransferable and that, as a consequence, lifetime partners could never realize any capital appreciation that the LTPs might accrue. On the record before us, however, we cannot conclude that the LTPs are nontransferable. Appellees first note that several class members testified that they were unaware that LTPs could be transferred or believed that they could not be. As discussed below, however, testimony as to the beliefs of actual purchasers, even if accurately characterized, is not dispositive. Appellees further note that several of the LTPs offering brochures explicitly prohibit transfer of LTPs. *See*, [*990*] *e.g.*, J.A. 2185H. Plaintiffs, however, submit evidence indicating the contrary. First, forms, purportedly prepared by PTL, which allow for the transfer of LTP benefits on a yearly basis, J.A. 2626, and a letter from PTL to certain LTP holders indicating that their LTPs were in fact transferable, again on a yearly basis, J.A. 2629. Last, PTL records tabulate the number of LTPs "transferred." *See* J.A. 2562-72. A jury might reasonably conclude that this and other references to the increasing value of the LTPs might

lead partners to infer that they had a right to transfer their LTPs. In short, we cannot say with certainty that a jury would necessarily conclude, on the evidence presented, that the LTPs were not transferable. As a consequence, we cannot rule out the possibility that the LTPs offered purchasers the possibility ofrealizing capital appreciation. *See Forman*, 421 U.S. at 854-55, 95 S.Ct. at 2061-62.

Thus, the LTPs cannot be excluded from securities law coverage as a matter of law. This conclusion is buttressed by a 1973 SEC interpretive release, *Offers and Sales of Condominiums or Units in a Real Estate Development*, Securities Act Release No. 5347, 1 Fed.Sec.L.Rep. (CCH) ¶ 1049 (Jan. 4, 1973) (listed at 17 C.F.R. § 231.5347) (acknowledged by the Supreme Court in *Forman*, 421 U.S. at 853 n.17, 95 S.Ct. at 2061 n. 17). The release describes conditions under which offerings of resort condominiums in conjunction with rental arrangements, pursuant to which the condominiums are to be occupied by the owners for part of the year but rented out most of the year, will constitute an offering of securities. The release, after analyzing relevant precedent, concludes:

> [T]he offering of condominium units in conjunction with any one of the following will cause the offering to be viewed as an offering of securities in the form of investment contracts:
>
> 1. The condominiums, with any rental arrangement or other similar service, are offered and

sold with emphasis on economic benefits to the purchaser to be derived from the managerial efforts of the promoter, or a third party designated or arranged for by the promoter, from rental of the units.

2. The offering of participation in a rental pool arrangement; and
3. The offering of a rental or similar arrangement whereby the purchaser must hold his unit available for rental for any part of the year, must use an exclusive rental agent or is otherwise materially restricted in his occupancy or rental of his unit.

1 Fed.Sec.L.Rep. (CCH) ¶ 1049, at 2072. The release contemplates that it would apply "to offerings of all types of units in real estate developments which have characteristics similar to those described herein." *Id.*, at 2071. The reasoning and conclusions set forth in the SEC release seem applicable to offerings of timeshares. [14] Indeed, one leading securities law treatise concludes that "[e]ssentially the same analysis applicable to resort condominiums should apply to timesharing ... offerings." II Louis Loss & Joel Seligman, *Securities Regulation* 970 (1989).

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[14] Our use of the term 'timeshares' to describe the LTPs has no bearing on our analysis of whether the LTPs are subject to regulation under the SCTSA. *See supra* note 9.

The release's third-numbered paragraph, quoted above, seems applicable in the instant case. The LTPs were offered subject to material restrictions as to partners' rights to occupy the various Heritage, USA resorts. In particular, partners were limited with respect to the amount of time each year that they could make use of the various resorts, and their rights to visit the resorts were conditioned upon the requirement that 50% of the resorts remain available for ordinary patrons who were not LTP holders. In effect, partners were required to hold their "interest" in the resorts available for rent during the majority of the year that they did not make use of the resorts.

Thus, we cannot conclude, on the record before us, that the LTPs are not securities. Such a determination is properly made by a jury. *See Zolfaghari v. Sheikholeslami*, 943 F.2d 451, 456 (4th Cir.1991). We therefore conclude that the district court erred in granting appellees' motion for a directed verdict [*991*] on plaintiffs' federal securities fraud claim against Bakker. We reach a similar conclusion with respect to plaintiffs' state securities fraud claim against Bakker. *See* N.C.Gen.Stat. § 78A-2(11) (defining "[s]ecurity" to include "investment contract").

Despite our conclusion that a jury question exists as to whether the LTPs constituted "securities," however, we must affirm the district court's dismissal of plaintiffs' claim that DH & S aided and abetted

Bakker's alleged federal securities fraud violation. In its recent opinion in *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, --- U.S. ----, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), the Supreme Court held that Section 10(b) does not support claims for aiding and abetting. On this basis, then, we affirm the district court's judgment as to this count.

Remaining for our review is the district court's dismissal of plaintiffs' claim that DH & S aided and abetted Bakker's alleged North Carolina violation of N.C.Gen.Stat. 78A-8. In resolving this question of state law such as this, we must, in the absence of definitive authority from North Carolina's highest court, attempt to divine what that court would do were it faced with this question. *See Roe v. Doe*, 28 F.3d 404, 406-07 (4th Cir. 1994). We would note that the Supreme Court of North Carolina has stated, in a case raising the issue of whether the *in pari delicto* defense applied to insider trading actions brought under the North Carolina securities law, that it "pay [s] great deference ... to decisions of the Supreme Court of the United States when they address issues similar to those before us in a given case." *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236, 239 (1985).[15] This suggests that,

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[15]We note, however, that, although the Supreme Court of North Carolina in *Skinner* relied heavily upon the opinion of the United States Supreme Court in

with regard to the issue now under discussion, the Supreme Court of North Carolina would follow the Supreme Court's holding in *Central Bank of Denver, N. A.* and conclude that the North Carolina anti-fraud provision does not support a cause of action for aiding and abetting a substantive violation thereof.

The issue proves more complicated than that, however. Examination of the language and form of the controlling North Carolina statute, N.C. Gen.Stat. § 78A-8, reveals that the statute "closely parallels the S.E.C. Rule 10b-5." [16] *Skinner v. E.F. Hutton*

Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985), and found its "reasoning [to be] compelling," 333 S.E.2d at 239, the state supreme court nevertheless rejected the Court's conclusion that the *in pari delicto* defense might have some role to play in federal securities laws litigation, concluding that the defense was wholly inapplicable to insider trading actions brought under the North Carolina securities law, *id.* at 240.

[16] N.C.Gen.Stat. § 78A-8 provides:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> (1) To employ any device, scheme, or artifice to defraud,
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or,

& Co., 70 N.C.App. 517, 320 S.E.2d 424, 427 (1984), *aff'd in part and rev'd in part*, 314 N.C. 267, 333 S.E.2d 236 (1985). We must assume that the North Carolina legislature consciously chose to model its anti-fraud provision on an SEC rule and not on the underlying federal statute. This assumption casts doubt upon whether the Supreme Court's holding in *Central Bank of Denver, N.A.*, based as it was upon an interpretation of Section 10(b) and not Rule 10b-5, should dictate that North Carolina law similarly does not recognize a cause of action for aiding and abetting a fraud in violation of state securities law.[17]

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(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

[17]The United States Supreme Court has, in many Section 10(b) cases, emphasized that the first resort, in determining the breadth of statutory and regulatory coverage, is to the language of the statute and that, while Rule 10b-5 may, on its face appear to embrace wider coverage than does Section 10(b), the SEC does not have the authority to broaden the coverage of Section 10(b) as enacted by Congress. s.g., Central Bank of Denver, --- U.S. at ----, 114 S.Ct. at 1446; *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472-74, 97 S.Ct. 1292, 1300-01, 51 L.Ed.2d 480 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14, 96 S.Ct. 1375, 1390-91, 47 L.Ed.2d 668 (1976). For example, in *Hochfelder*, 425 U.S. at 212, 96 S.Ct. at 1390, the Court observed:

[*992*] We nevertheless find the United States Supreme Court's opinion in *Central Bank of Denver, N. A.* persuasive as to the North Carolina state law question. Included in the opinion, as an independent ground for the Supreme Court's holding, is the following:

> Our reasoning is confirmed by the fact that respondents' argument would impose 10b-5 aiding and

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> The [SEC] contends ... that subsections (b) and (c) of Rule 10b-5 are cast in language which--if standing alone--could encompass both intentional and negligent behavior.... Viewed in isolation the language of subsection (b), and arguably that of subsection (c), could be read as proscribing, respectively, any type of material misstatement or omission, and any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not.

The Court concluded, however, that what Rule 10b-5 might mean if "[v]iewed in isolation" was irrelevant: at all events, the SEC could not, by regulation, broaden the statutory scope of Section 10(b), and the liability imposed by Section 10(b), the Court found, did not extend to negligent conduct, 425 U.S. at 214, 96 S.Ct. at 1391.

We, of course, need not determine here whether Section 78A-8 extends to negligent conduct. We do, however, observe that such a determination is unclear in light of the similarity of Section 78A-8 to Rule 10b-5 and that, similarly, the determination of whether other issues resolved under Section 10(b) and Rule 10b-5, such as the determination of whether a private cause of action for aiding and abetting liability exists, would apply analogously to North Carolina securities law is unclear.

> abetting liability when at least one element critical for recovery under 10b-5 is absent: reliance. A plaintiff must show reliance on the defendant's misstatement or omission to recover under 10b5. *Basic Inc. v. Levinson*, [485 U.S. 224, 243, 108 S.Ct. 978, 989, 99 L.Ed.2d 194 (1988)]. Were we to allow the aiding and abetting action proposed in this case, the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions. See also [*Chiarella v. United States*, 445 U.S. 222, 228, 100 S.Ct. 1108, 1115, 63 L.Ed.2d 348 (1980)] (omission actionable only where duty to disclose arises from specific relationship between two parties). Allowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b-5 recovery mandated by our earlier cases.

--- U.S. at ---- - ----, 114 S.Ct. at 1449-50. Under the North Carolina Supreme Court's opinion in *Skinner*, this reasoning, grounded upon Rule 10b-5, is equally applicable to plaintiffs' claim against DH & S brought under Section 78A-8.[18]

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[18] The opinion of the North Carolina Court of Appeals in *State v. Williams*, 98 N.C.App. 274, 390 S.E.2d 746, 750 (1990), where the court reviewed the criminal conviction of an attorney for violating N.C.Gen.Stat. § 78A-8, provides additional support for this conclusion. There, although the question of criminal

In summary, we reinstate plaintiffs' securities fraud claims under federal and state law against Bakker, but we affirm the dismissal of plaintiffs' federal and state securities fraud claims against DH & S.

IV.

The jury rejected plaintiffs' claim of timeshare fraud under the SCTSA. The district court denied plaintiffs' motion for a new trial, from which denial plaintiffs appeal. Because we conclude that the LTPs at issue in this case are not "vacation time sharing plan[s]" subject to regulation under the SCTSA, we affirm the district court's denial of plaintiffs' motion in this regard.

The SCTSA proscribes fraud in connection with the sale of "vacation time sharing plans." S.C.Code Ann. § 27-32-110; *see generally* Michelle D. Brodie, Note, *Regulation of Time Sharing in South Carolina*, 37 S.C. L.Rev. 527 (1986). The phrase "vacation time

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aiding and abetting liability under North Carolina securities law was not squarely raised, *compare Central Bank of Denver*, --- U.S. at ----, 114 S.Ct. at 1455 (noting that "an aider and abettor of a criminal violation of any provision of the 1934 Act, including § 10(b), violates 18 U.S.C. § 2"), the state appellate court in Williams *strictly construed criminal liability under the state securities law. We believe that North Carolina courts would not construe the analogous civil liability significantly more broadly in this respect.*

sharing plan" is elucidated by statutory definitional provisions. First, " '[v]acation time sharing plan' means either a vacation time sharing ownership plan or a vacation time sharing lease plan." S.C.Code Ann. § 27-32-10(10). Pertinent here,

> [*993*] "[v]acation time sharing lease plan" means any arrangement, plan or similar devise, whether by membership agreement, lease, rental agreement, license, use agreement, security or other means, whereby the purchaser receives a right to use accommodations or facilities, or both, but does not receive an undivided fee simple interest in the property, for a specific period of time during any given year, but not necessarily for consecutive years, *and which extends for a period of more than one year*....

Id. § 27-32-10(9) (emphasis added).[19]

We believe it crucial that the definition of "vacation time sharing lease plan" is restricted to those plans "which extend[ ] for a period of more than one year." This represents a conscious choice by South Carolina's legislature not to regulate, at least under the SCTSA, those timeshare plans which are of less than

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[19] Section 27-32-10(8) provides for an analogous definition for "vacation time sharing ownership plan" which requires that owners receive an undivided ownership interest in, as well as the right to use, the accommodations and/or facility in question.

one year's duration.

The LTPs at issue in this case, by contrast, are the timeshare counterparts of life estates. *See* Brodie, *supra*, at 530-38 (describing the SCTSA as distinguishing between timeshare interests based upon their categorization in terms of traditional fee and nonfee interests in real property). A life estate, of course, may well extend beyond one year's duration. Importantly, however, a life estate may also terminate within one year of its creation. We believe that, just as a contract which persists for the duration of a person's life consequently does not satisfy the Statute of Frauds' requirement that all contracts not to be performed within one year of the contract's making be in writing, *see* S.C.Code Ann. § 32-3-10(5) (requiring that any "action ... brought ... [t]o charge any person upon any agreement that is not to be performed within the space of one year from the making thereof" be in writing),[20] a life estate

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[20]We do not mean for our citation to S.C.Code Ann. § 32-3-10(5) to imply that that provision of that statute of frauds would apply to contracts regarding timeshare purchases. *See* S.C.Code Ann. § 32-3-10(4) (requiring that "any action ... brought ... [t]o charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them" be in writing); *id.* § 27-35-20 (requiring that "[a]ny agreement for the use or occupation of real estate for more than one year" be in writing); *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891, 894 (1989) (suggesting that, in an action brought by lessees against lessors regarding

timeshare interest cannot satisfy the statutory requirement that the timeshare plan "extend[ ] for a period of more than one year." The state legislature has not chosen to extend timeshare fraud protection beyond terms of years to life estates, and it is not for us to second-guess that choice.

We conclude that the LTPs sold by PTL are not "vacation time sharing plans" as a matter of law and, on that basis, affirm the judgment entered against the plaintiff class on their timeshare fraud claims.[21]

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oral modifications of a written lease contract, S.C.Code Ann. §§ 32-3-10(4), 32-3-10(5), and 27-35-20 might all have applicability). We wish only to note that the concept that a contract that lasts only for a person's life is not considered to be a contract that necessarily extends for any length of time is quite common in our law and that, therefore, it is not unreasonable to expect that, had South Carolina's legislature intended to regulate timeshares that are keyed to the holder's life, it would have made that intention explicit in the statute.

[21] We feel compelled to note a grave error on the part of the trial court. The district court allowed into evidence the testimony of two "expert witnesses" called by DH & S: David Martin, who, while serving as general counsel to the South Carolina Real Estate Commission, drafted the SCTSA; and Aleta Pillick, an attorney who, while in her former employ with the South Carolina Tax Commission, investigated the LTPs and concluded that they were not timeshares. By admitting this evidence, the district court treated the proper interpretation of the relevant statutory provision, S.C.Code Ann. § 27-32-10(9), as a matter properly resolved by the jury. As we make clear in the text, this question is purely one of law and is

[*994*] V.

Plaintiffs allege that the district court erred in denying their motion for a new trial with respect to their claim against DH & S for aiding and abetting, and conspiring in, Bakker's common law fraud. We conclude, however, that the district court did not abuse its discretion in denying this motion. While the record contains evidence which supports plaintiffs' various theories of aiding and abetting liability on the part of DH & S, we cannot say that the district court abused its discretion in concluding that the jury's verdict was neither against the clear weight of the evidence nor manifestly unjust. *See Poynter ex rel. Poynter,*

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properly resolved by the court; indeed, the proper resolution of this question mandates judgment for appellees, leaving nothing for the jury to determine. Moreover, even were there a material question of fact relating to the duration of the LTPs, it would still be error for the district court to have allowed the testimony of the witnesses listed above into evidence. Expert testimony as to the proper interpretation of applicable domestic law is inadmissible. *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366-67 (4th Cir.1986). "[I]t is the responsibility--and the duty--of the court to state to the jury the meaning and applicability of appropriate law, leaving to the jury the task of determining the facts which may or may not bring the challenged conduct within the scope of the court's instruction as to the law." *Id.* at 366. *See* Fed.R.Evid. 702 (expert testimony is admissible to the extent that it "will assist the trier of fact to understand the evidence or to determine a fact *in issue" (emphasis added)).*

supra, 874 F.2d at 223. Appellants, in effect, ask us to retry issues already heard and ruled upon by a jury. This we will not do. It is indeed a rare case where we will second-guess both the jury and the district court in this regard. Nothing in the case now before us warrants such action here.[22]

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[22] Plaintiffs raise, in addition, two legal arguments with regard to the district court's handling of their common law fraud claim against DH & S. They first argue that the district court's jury instruction misled thejury with respect to the applicable statute of limitation. North Carolina law requires that an action for fraud be brought within three years of the accrual of the cause of action; "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." N.C.Gen.Stat. § 1-52(9). Plaintiffs argue that the district court's jury instruction left the jury with the impression that the three-year statute of limitation ran, without qualification, from the date the fraud was perpetrated and not from the date the fraud was, or should reasonably have been, discovered. The record refutes this argument, however. The jury instruction, as a whole, adequately elucidated the relevant law. Thus, although the statute of limitations instruction need not have been delivered as it appears that no Lifetime Partners were aware of PTL's financial difficulties until 1986, the delivery of the instruction led to no prejudicial error.

Plaintiffs also allege that the district court erred in prohibiting counsel for plaintiffs from making reference to DH & S's failure to call a witness who, plaintiffs claim, would have substantiated their fraud claims against DH & S. In order for it to be appropriate for the jury to draw an adverse inference from the failure of a party to call a witness, the witness must not be "equally available to either

VI.

We turn next to the plaintiff class's RICO and NC-RICO claims. The jury heard the evidence presented and ruled against the class on each of these claims. The district court denied plaintiffs' motion for a new trial, from which denial they now appeal.

As stated above, we review the district court's denial of a motion for a new trial solely for abuse of discretion. We have little trouble concluding that the district court was well within its authority in ruling as it did in the case at bar.[23]

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party." *Dunlap v. G. & C. Towing, Inc.*, 613 F.2d 493, 497 (4th Cir.1980). In *Dunlap*, we noted that plaintiff's treating physician was, in fact, "equally available to either party." *Id.* Here, Fisher, a former employee of DH & S, was, at the time of trial, no longer in DH & S's employ. We see no reason why Fisher was not equally available to be called by plaintiffs as by DH & S and, consequently, find no error in the district court's action.

[23]Plaintiffs also raise two matters of law with respect to the RICO and NC-RICO verdicts. Plaintiffs first submit that the district court erred in leaving it to the jury to determine whether Bakker committed the requisite RICO predicate acts. They argue that, in light of Bakker's previous convictions, affirmed by this Court, for mail and wire fraud, that element of RICO and NC-RICO was established by collateral estoppel. Plaintiffs failed to raise this argument to the district court, whether in the form of a motion for partial summary judgment, suggested jury instructions or otherwise. Given plaintiffs' failure to raise the issue of collateral estoppel to the court below, we decline to consider the argument here. *See Liberty Corp. v. NCNB Nat'l Bank*

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of South Carolina, 984 F.2d 1383, 1389-90 (4th Cir.1993).

Plaintiffs next argue that the jury instructions delivered by the district court were erroneous in three respects. They first argue that error arose because the instructions referred to RICO predicate acts as "crimes." At no time, however, did the district court instruct the jury that RICO required proof of a predicate act beyond a reasonable doubt. Review of the record, however, convinces us that the RICO jury instructions, taken as a whole, fairly state the applicable law in this regard.

Second, with respect to the court's NC-RICO instructions, the district court instructed the jury that proof beyond a reasonable doubt was required under NC-RICO. Plaintiffs agreed below that proof beyond a reasonable doubt was required with respect to Bakker's primary NC-RICO violation but argue that the district court erred in instructing the jury to apply that standard to DH & S's alleged action aiding and abetting Bakker's primary violation. Because the jury found that Bakker had not committed a primary violation, any error in this regard is harmless. We would further note that the fact that the district court emphasized to the jury that it should apply the reasonable doubt standard under NC-RICO supports our conclusion that the jury did not, due to a misunderstanding of the court's instructions, apply the reasonable doubt standard to plaintiffs' RICO claims.

Last, plaintiffs argue that the district court misinstructed the jury as to 18 U.S.C. § 1962(b), which provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or

[*995*] VII.

The plaintiff class objects to the district court's instruction to the jury that, in order to find Taggart and Cortese liable, it had to find that they had acted with gross negligence. Plaintiffs claim that, under North Carolina law, directors of a corporation are liable to persons who deal with that corporation for ordinary negligence where such negligence contributes to losses.

We disagree. In *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385, 394 (1988), the Supreme Court of North Carolina held that a portion of a trial court's jury instruction

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foreign commerce.

Plaintiffs argue that Section 1962(b) does not require direct equity ownership in the RICO enterprise as plaintiffs contend is required by the court's instruction to the jury that "[a]cquiring an interest in an enterprise means acquiring of [sic] stock or ownership equity, and not merely the existence of an employment relationship with the enterprise." Tr. 8083-84. Further along in the instruction, however, the court instructed: "In order for you to find that plaintiffs have established [that Bakker acquired or maintained an interest in PTL], you must find that Bakker .... gained actual day-to-day involvement in the management and operation of PTL." Tr. 8086. We believe that this explanation sufficiently removed any thought the jury might have had that, to find that Bakker acquired an interest in PTL, it had to find that Bakker acquired an equity interest in PTL. We therefore reject plaintiffs' argument. An analogous argument under NC-RICO similarly fails.

> was erroneous because it suggested to the jury that directors and managing officers are chargeable with an omniscient knowledge of the company's affairs and are liable for damages to third parties resulting from simple negligence. This is not the law in North Carolina. *See Minnis v. Sharpe*, [202 N.C. 300, 162 S.E. 606, *rev'd on other grounds*, 203 N.C. 110, 164 S.E. 625 (1932)].

While plaintiffs attempt to distinguish *Myers & Chapman, Inc.* from the case at bar, we think the holding of that case clearly controls here and reject plaintiffs' attempt to avoid its impact. We therefore find no error in the district court's jury instruction. We also reject plaintiffs' contention that the district court abused its discretion in denying their motion for a new trial on these counts.

VIII.

Bakker cross-appeals from the district court's entry of judgment against him on the common law fraud claim, arguing that the district court erred in not resolving the issues of reliance, causation and damages on an individual and not a classwide basis.[24] Given the facts and circumstances surrounding the LTP scheme and the means according to which the fraud found

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[24]We note, however, that "Bakker does not contest the certification of the class." Appellees' Br. 58.

by the jury was perpetrated, we reject Bakker's contention.

IX.

Taggart and DH & S appeal the denial by the district court of their motion for a grant of costs against the plaintiff class. Prevailing parties are entitled to move for an award of costs pursuant to Federal Rule of Civil Procedure 54(d)(1), [25] which provides, in [*996*] pertinent part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs ... shall be allowed as of course to the prevailing party unless the court otherwise directs...." The rule makes clear that, in the ordinary course, a prevailing party is entitled to an award of costs. *Constantino v. American S/T Achilles*, 580 F.2d 121, 123 (4th Cir.1978). Indeed, the rule gives rise to a presumption in favor of an award of costs to the prevailing party. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352, 101 S.Ct. 1146, 1150, 67 L.Ed.2d 287 (1981); *Coyne-Delany Co. v. Capital Dev. Bd. of Illinois*, 717 F.2d 385, 390 (7th Cir.1983). We have stated that, in a case where the district court feels

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[25] Taggert's and DH & S's motion was, in fact, made pursuant to former Rule 54(d), which, following 1993 amendment of the rule, is now contained, without substantive change except for an express provision that motions for attorney's fees are not meant to be addressed therein, in Rule 54(d)(1).

that aberration from this general rule is appropriate, the court must justify its decision by "articulating some good reason for doing so." *Oak Hall Cap and Gown Co. v. Old Dominion Freight Line, Inc.*, 899 F.2d 291, 296 (4th Cir.1990); *see Constantino*, 580 F.2d at 123 (reversing the district court's denial of costs where the court stated no reason for its action).

We have yet to have occasion to elucidate what might constitute a "good reason" in this context. We look for guidance to the statements of our sister circuits on the matter. The Sixth Circuit has suggested that "good reasons" might include the excessiveness of costs in a particular case, actions taken by the prevailing party which unnecessarily prolonged trial or injected meritless issues, the fact that the prevailing party's recovery is so small that the prevailing party is victorious in name only, and the fact that the case in question was a close and difficult one. *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 730 (6th Cir.1986). The Seventh Circuit has suggested that "good reasons" may arise from "objective factors [,] such as the resources of the parties, the defendant's efforts or lack thereof to mitigate his damages, and the outcome of the underlying suit." *Coyne-Delany Co.*, 717 F.2d at 392. [26] The Seventh Circuit has also posited

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[26] ***But see Congregation of the Passion, Holy Cross Province v. Touche, Ross & Co.***, 854 F.2d 219, 222 (7th Cir.1988)

that the mere fact that a suit may have been brought in good faith is alone insufficient to warrant a denial of costs in favor of a prevailing defendant. *Id.* We agree; to hold otherwise would frustrate the rule that, in the ordinary case, a prevailing party is entitled to an award of costs, *see id.* This, of course, does not mean that good faith is not a valid factor to consider in determining whether an award of costs is appropriate; to the contrary, it seems to us that good faith on the part of a losing party would be a virtual prerequisite to a denial of costs in favor of the prevailing party.

With this background, we turn to the instant case. The district court found that plaintiffs had rebutted the presumption in favor of awarding Taggart and DH & S their costs on the grounds that plaintiffs had proceeded in good faith, that plaintiffs' case against Taggart and DH & S "was, for the most part, a relatively close and difficult case," J.A. 1815, and on the ground that, given that plaintiffs were in general of modest means and had fallen victim to Bakker's fraud, "it would be inequitable to tax the plaintiffs with the costs incurred by defendants [DH & S] and

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("Generally, only misconduct by the prevailing party worthy of a penalty or the losing party's inability to pay will suffice to justify denying costs."); *Schwarz v. Folloder*, 767 F.2d 125, 131 (5th Cir.1985) (describing the denial of costs as in the nature of a penalty); *Serna v. Manzano*, 616 F.2d 1165, 1167 (10th Cir.1980) (same).

Taggart," *id.*

We review for abuse of discretion the district court's disposition of a victorious party's motion for costs. *Oak Hall Cap and Gown Co.*, 899 F.2d at 296.[27] We cannot say [*997*] that the district court abused its discretion in considering plaintiffs' good faith in pursuing claims against Taggart and DH & S, the closeness of the outcome, or the equities in conducting its analysis; nor do we find any abuse in the district court's conclusion.[28] We consequently reject Taggart's and DH & S's cross-appeals.

CONCLUSION

We find no merit in plaintiffs' remaining assignments of error.[29] We reverse the district

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[27]The Seventh Circuit has suggested that the "abuse of discretion" standard in reviewing Rule 54(d) motions "merges into the standard of simple error used in reviewing decisions of questions of law." *Coyne-Delany Co.*, 717 F.2d at 392. We would simply note that our precedent endorses, without question, the abuse of discretion standard.

[28]We recognize that the district court awarded costs to Cortese and that the only apparent difference between plaintiffs' case against her and their cases against DH & S and Taggert is that the district court felt that the case against Cortese "was neither close nor difficult." J.A. 1816. The district court did not abuse its discretion in determining that, in this case, that factor tipped the scales as to the fortunes of the various parties in this regard.

[29]We note that plaintiffs claim prejudicial error arising from the district court's decision

court's entry of judgment as a matter of law against plaintiffs on their securities fraud claims against Bakker and remand for further proceedings not inconsistent with this opinion. We otherwise affirm the judgments of the district court in all respects.

AFFIRMED IN PART AND
REVERSED AND REMANDED IN PART.

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not to allow plaintiffs to call an expert securities witness because of plaintiffs' tardiness in naming the expert. Given our disposition of plaintiffs' securities fraud claims, we see no reason to address this contention.

FOURTH CIRCUIT DENIAL OF REHEARING

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 91-2101, -2120, -2121

[STYLE OMITTED]

(Filed: October 18, 1994)

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

A-52

DISTRICT COURT OPINION

U.S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
NO. C-C-87-514-M
[STYLE OMITTED]
(Filed: December 5, 1990)

In United Housing Foundation v. Forman, 421 U.S. 837 (1975), the United States Supreme Court held that "when a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply." Id. at 852-53 (footnote and citation omitted). Under Forman, the lifetime partnerships at issue in this case are not securities as a matter of law.

Accordingly, plaintiffs' federal and state securities fraud claims are hereby DISMISSED.

This 5 day of December, 1990.

/s/ James B. McMillan
James B. McMillan
United States District Judge

STATUTES

Securities Exchange Act § 10(b), 15 U.S.C. § 78:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe.

SEC Rule 10b-5, 17 C.F.R. § 240.10b-5:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of

business which operates or would operate as a fraud or deceit upon any person.

Federal RICO:

18 U.S.C. § 1961. Definitions

As used in this chapter-

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction

of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant, section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relation to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations), or section 501(c)

(relating to embezzlement from union funds,), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

* * * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * * *

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has

participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provision of subsections[1] (a), (b), or (c) or this section.

18 U.S.C. § 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therfor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

North Carolina Securities Law:

N.C.G.S. § 78A-8

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

(1) To employ any device, scheme, or artifice to defraud.

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or,

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or

deceit upon any person.

North Carolina RICO:

N.C.G.S. § 75D-2. Findings and intent of General Assembly.

(a) The General Assembly finds that a severe problem is posed in this State by the increasing organization among certain unlawful elements and the increasing extent to which organized unlawful activities and funds acquired as a result of organized unlawful activity are being directed to and against the legitimate economy of the State.

(b) The General Assembly declares that the purpose and intent of this Chapter is: to deter organized unlawful activity by imposing civil equitable sanctions against this subversion of the economy by organized unlawful elements; to prevent the unjust enrichment of those engaged in organized unlawful activity; to restore the general economy of the State all of the proceeds, money, profits, and property, both real and personal of every kind and description which is owned, used or acquired through organized unlawful activity by any person or association of persons whether natural, incorporated or unincorporated in this State; and to provide compensation to private persons injured by organized unlawful activity. It is not the intent of the General Assembly to in any way interfere with the attorney-client relationship.

* * * *

N.C.G.S. § 75D-3. Definitions.

As used in this Chapter, the term:

(a) "Enterprise" means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this State, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; or any uncharted union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.

(b) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents, provided at least one of such incidents occurred after October 1, 1986, and that at least one other of such incidents occurred within a four-year period of the time of the other, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.

(c)

(1) "Racketeering activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be

chargeable by indictment of such act or acts were accompanied by the necessary mens rea or criminal intent under the following laws of this State.

a. Article 5 of Chapter 90 of the General Statute of North Carolina relating to controlled substances and counterfeit controlled substances

b. Chapter 14 of the General Statutes of North Carolina except Articles 9, 22A, 38, 40, 43, 46, 47, 59 thereof; and further excepting G.S. Sections 14-78.1, 14-82, 14-86, 14-145, 14-146, 14-147, 14-177, 14-178, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-202, 14-247, 14-248, 14-313 thereof.

c. Any conduct involved in a "money laundering" activity; and

(2) "Racketeering activity" also includes the description in Title 18, United States Code Section 1961(1).

* * * *

N.C.G.S. § 75D-4. Prohibited activities.

(a) No person shall:

(1) engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or

(2) conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed

by or associated with such enterprise; or

(3) conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.

(b) Violation of this section is inequitable and constitutes a civil offense only and is not a crime, therefore an mens rea or criminal intent is not an essential element of any of civil offenses set forth in this section. (1985) (Reg. Sess., 1986), c. 999, s. 1.)

N.C.G.S. § 75D-8. Available RICO civil remedies.

* * * *

(c) Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees. For purposes of this subsection, "pattern of racketeering activity" shall require that at least one act of racketeering activity be an act of racketeering activity other than (i) an act indictable under 18 U.S.C. § 1343, or (ii) an act which is an offense involving fraud in the sale of securities. * * * *

(e) A final conviction in any criminal proceeding for a violation of those laws set forth in G.S. 75D-3(c), shall estop the defendant in any subsequent civil action or proceeding under this Chapter as to all matters proved in the criminal proceeding. * * * *

N.C.G.S. § 14-90. Embezzlement of property

received by virtue
of office or employment.

If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, or any officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except person under the age of 16 years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, unincorporated association or organization which shall have come into his possession or under his care, he shall be punished as a Class H felon.

South Carolina Timeshare Law:

S.C. Code 27-32-10 Definitions.

* * * *

(9) "Vacation time sharing lease plan" means any

arrangement plan or similar devise, whether by membership agreement, lease, rental agreement, license, use agreement, security or other means, whereby the purchaser receives a right to use accommodations or facilities, or both, but does not receive an undivided fee simple interest in the property, for a specific period of time during any given year, but not necessarily for consecutive years, and which extends for a period of more than one year.

Such lease plans do not include an arrangement or agreement whereby a purchaser in exchange for an advance fee and yearly dues is entitled to select from a designated list of facilities located in more than one state accommodations, of companies which operate nationwide in at least nine states in the United States through franchises or ownership, for a specified time period and at reduced rates and under which no interest in real property is transferred

(10) "Vacation time sharing plan" means either a vacation time sharing ownership plan or a vacation time sharing lease plan as defined herein.

RELEVANT PARTS OF RESTATED AMENDED COMPLAINT

Primary Securities Claims against DH&S:

160B. DELOITTE AIDED AND ABETTED, AND PARTICIPATED AND CONSPIRED IN, THE LIFETIME PARTNERSHIP FRAUD, BY ITS CERTIFICATION OF PTL'S FINANCIAL STATEMENTS OF MAY 1984 AND NOVEMBER 1983 KNOWING OF THEIR FALSE AND MISLEADING NATURE AND BY EACH OF THE FOLLOWING 10 KNOWING OMISSIONS AND ACTS ("THE ACCOUNTANT AIDING AND ABETTING OR PARTICIPATION OR CONSPIRACY"), AS DESCRIBED IN DEPOSITIONS, MADDEN'S JULY 1989 EXPERT'S REPORT, AND PLAINTIFFS' NOVEMBER 24, 1989 BRIEF, ALL WITH CONSCIOUS INTENT AND IN VIOLATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES AND AUDITING STANDARDS (GAAP AND GAAS): (1) IT COVERED UP (OR MISREPRESENTED) LIFETIME PARTNERSHIP OVERSALES AND THE FALSITY OF PROMISES OF GREAT LIFETIME PARTNERSHIP VALUE; (2) IT COVERED UP (OR MISREPRESENTED) PTL'S INSOLVENCY AND APPARENTLY DESTROYED KEY DOCUMENTS; (3) IT MANAGED AND COVERED UP (OR MISREPRESENTED) THE SECRET BANK ACCOUNT AND WROTE ALL CHECKS (BUT DID NOT SIGN THEM); (4) IT COVERED UP (OR MISREPRESENTED) THE

LIFETIME PARTNER INVESTMENT DIVERSIONS; (5) IT ASSISTED AND COVERED UP (OR MISREPRESENTED) THE PRIVATE INUREMENT THAT CONSTITUTED THE FORMER OFFICER EMBEZZLEMENT; (6) IT COVERED UP (OR MISREPRESENTED) PTL'S TAX EXEMPTION LOSS; (7) IT COVERED UP (OR MISREPRESENTED) THE CONSTRUCTION EMBEZZLEMENT; (8) IT COVERED UP THE TIME SHARE LAW VIOLATIONS (DESCRIBED IN COUNTS 3-6); (9) IT COVERED UP THE SECURITIES LAW VIOLATIONS (DESCRIBED IN COUNTS 7-12); (10) IT COVERED UP THE INADEQUATE ACCOUNTING CONTROLS AND INADEQUATE AUDIT PROCEDURES. DELOITTE KNEW OF AND SUBSTANTIALLY ASSISTED, AND PARTICIPATED AND CONSPIRED IN, THE OMISSIONS AND MISREPRESENTATIONS, ON INFORMATION AND BELIEF. DELOITTE HAD A DUTY TO DISCLOSE THE OMISSIONS (OR ALTERNATIVELY THE MISREPRESENTATIONS) TO THE LIFETIME PARTNERS. OMISSIONS AND OTHER ACTS BY DELOITTE REFER TO JANUARY 1984 THROUGH MAY 1985 AND LATER CONSEQUENCES, AND EARLIER OMISSIONS AND ACTS WHEN AIDED AND ABETTED OR KNOWN BY DELOITTE AS PART OF CONSPIRACY.

. . . .

COUNT 7: FEDERAL SECURITIES LAWS FRAUD VIOLATIONS

370. Plaintiffs repeat and reallege all preceding allegations in this complaint.

(1) Antifraud Provision of Securities Act of 1933

371. The Former Officer Co-Conspirators and Messner & Company, with the substantial participation of DELOITTE AND LAVENTHOL . . ., "offer[ed] or s[old] a security (whether or not exempted . . .), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includ[ed] an untrue statement of a material fact or omit[ted] to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission)," and knew or in the exercise of reasonable care could have known of such untruth or omission, and thus are "liable to the person purchasing such security from [them]" (Securities Act of 1933 § 12(2), 15 U.S.C. § 77l(2)).

372. Said defendants offered and sold Lifetime Partnership Investments to the Lifetime Partners by mail, television, and telephone (the Lifetime Partnership Investment was described in Part III(A) and was incorporated herein by reference).

373. Said defendants made the Lifetime Partnership Promises in the Lifetime Partnership Offer and other mailed representations, and in other oral

representations by television and telephone. The foregoing representations contained the Material Misstatements and the Material Omissions (defined above).

374. The Lifetime Partners relied on the Lifetime Partnership Promises, including the Material Misstatements and Material Omissions. They did not then know of the untruths and omissions, and could not have known of them in the exercise of reasonable care. Such untruths and omissions were clearly material to the value of the Lifetime Partnership Investment.

375. The Lifetime Partners purchased the securities consisting of Lifetime Partnership Investments from the Former Officer Co-Conspirators and Messner & Company. Said defendants are liable to the Lifetime Partners.

375A. Bakker and Messner and some other Former Officer Co-Conspirators participated in the offers and sales by offering them by Bakker's letters, Bakker's and Messner's television appearances and offers, and other acts. The other Former Officer Co-Conspirators were substantial participants in the offers and sales by participating in strategy meetings, in offering material design, and in other acts, as well as aiding and abetting. Such defendants gained from the sales through the Former Officer Embezzlement and Secured Creditor Embezzlement.

375B. DELOITTE AND LAVENTHOL AUDITED AND CERTIFIED financial statements for PTL in connection with such

offers and sales without disclosing the securities and time share violations or the Foremer Officer Embezzlement and Secured Creditor Embezzlement, did not protest those violations to the PTL board and management or to the public or any governmental authority, in fact aided and abetted the Former Officer Co-Conspirators in those violations, and otherwise were substantial participants in the fraudulent sales process. DELOITTE AND LAVENTHOL gained from the sales through the receipt of accounting fees. DELOITTE AND LAVENTHOL, THROUGH THE ACCOUNTANT AIDING AND ABETTING OR PARTICIPATION OR CONSPIRACY, KNEW OF THE FOREGOING OMISSIONS AND MISREPRESENTATIONS AND ASSISTED THEM BY THEIR KNOWING AND/OR RECKLESS AND/OR CONSCIOUSLY INTENDED OMISSIONS AND ACTS DESCRIBED IN PARAGRAPHS 160B AND 160C.

375C. [INTENTIONALLY OMITTED.]

376. The Lifetime Partners bring this action within a year of when they discovered, or should have discovered in the exercise of reasonable care, the Material Misstatements and Material Omissions. That discovery could only occur after March 19, 1987 because relevant information was not reasonably available until the public revelations leading to Bakker's resignation, and in fact was covered up by the Former Officer Co-Conspirators, DELOITTE AND LAVENTHOL, Messner & Company, ...

(2) Antifraud Provisions of Securities Exchange Act of 1934

377. The Former Officer Co-Conspirators and Messner & Company, with the substantial participation of DELOITTE AND LAVENTHOL . . ., knowingly and intentionally "use[d] or employ[ed], in connection with the purchase or sale of any security . . ., any manipulative or deceptive device or contrivance in contravention of [SEC] rules and regulations" (Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b)); and, "by the use of any means or instrumentality of interstate commerce, or of the mails," acted "(a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security" (Securities and Exchange Commission Rule 10b-5).

378. Said defendants sold, and the Lifetime Partners purchased, Lifetime Partner Investments that constitute securities (as described above).

379. Those offers and sales occurred by mail, television, and telephone.

380. Said defendants made the Lifetime Partnership Promises by the Lifetime Partnership Offer and other

written materials, and by oral statements on television and by telephone. Those promises and the Lifetime Partnership offers and sales contained the Material Misstatements and the Material Omissions (defined above), and thus said defendants knowingly and intentionally employed a device, scheme, or artifice to defraud, made material misstatements and material omissions, and engaged in acts or practices operating as a fraud and deceit on the Lifetime Partners. Said defendants had far greater access than did the offerees of the Lifetime Partnerships to relevant information, and knew and intended that such offerees would rely on the Material Misstatements and Material Omissions.

381. The foregoing fraudulent practices were engaged in in connection with the purchase and sale of securities, the Lifetime Partnerships.

382. The Lifetime Partners in fact relied on the Lifetime Partnership Promises, including the Material Misstatements and Material Omissions. Said defendants knew and intended that the Lifetime Partners would so rely.

383. Those misstatements and omissions caused the investment by the Lifetime Partners.

384. Said defendants acted with scienter, or an intent to defraud or reckless disregard for the truth of the statements and omissions made.

385. Said defendants are liable to the Lifetime Partners. Bakker and Messner and some other Former Officer Co-Conspirators participated in the offers and

sales by offering them by Bakker's letters, Bakker's and Messner's television appearances and offers, and other acts. The other Former Officer Co-Conspirators were substantial participants in the offers and sales by participating in strategy meetings, in offering material design, and in other acts, as well as aiding and abetting the fraudulent offers and sales. Such defendants gained from the sales through the Former Officer Embezzlement and Secured Creditor Embezzlement.

385A. DELOITTE AND LAVENTHOL AUDITED AND CERTIFIED financial statements for PTL without disclosing the securities and time share violations or the Former Officer Embezzlement and Secured Creditor Embezzlement, did not protest those violations to the PTL board and management or to the public or any governmental authority, in fact aided and abetted the Former Officer Co-Conspirators in those violations in general and also in the case of Laventhol & Horwath and Spears by maintaining fraudulent accounting practices and executing fraudulent transactions, and therefore intentionally engaged in a course of business which they knew would operate as a fraud on the Lifetime Partners in connection with their purchase of Lifetime Partnerships. DELOITTE AND LAVENTHOL gained from the sales through the receipt of accounting fees. DELOITTE AND LAVENTHOL, THROUGH THE ACCOUNTANT AIDING AND ABETTING OR PARTICIPATION OR CONSPIRACY, KNEW OF THE FOREGOING OMISSIONS AND MISREPRESENTATIONS AND

ASSISTED THEM BY THEIR KNOWING AND/OR RECKLESS AND/OR CONSCIOUSLY INTENDED OMISSIONS AND ACTS DESCRIBED IN PARAGRAPHS 160B AND 160C.

385B. [INTENTIONALLY OMITTED.]

386. The Former Officer Co-Conspirators and Messner & Company, to the extent not primarily liable under sections 12(2) and 10(b), are liable as controlling persons of PTL pursuant to Section 15 of the Securities Act of 1933 (15 U.S.C. § 77o) and Section 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78t). Each such defendant, either as officer, director, or confidant and co-conspirator with officers and directors, "possess[ed], direct[ly] or indirect[ly], . . . the power to direct or cause the direction of the management and policies" of PTL. (Securities and Exchange Commission Reg. C § 405). Such defendants had control of PTL and the fraudulent sale of Lifetime Partnerships "pursuant to or in connection with an agreement or understanding with one or more persons" (15 U.S.C. 77o), in that they all participated in the conspiracy with PTL management to effect the fraudulent sales.

387. The partial nonprofit organization exemption under securities laws, if applicable in this case, only provides exemption from certain registration requirements and not from the antifraud provisions of the securities laws.

388. Plaintiffs as the result of defendants'

wrongful actions have suffered the damages, and demanded the relief, described at the end of this complaint.

COUNT 8:NORTH CAROLINA SECURITIES ACT FRAUD VIOLATIONS

389. Plaintiffs repeat and reallege all preceding allegations in this complaint.

390. The Former Officer Co-Conspirators and Messner & Company, with the substantial participation of DELOITTE AND LAVENTHOL . . ., "offer[ed] or s[old] a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission)," and knew or acted in reckless disregard of the untruth or omission, and thus are "liable to the person purchasing the security" from them (N.C.G.S. § 78A-56(a)(2)).

400. Because of the similarity of the foregoing section to Securities Act of 1933 § 12(2), section (1) of count 7 herein is incorporated herein by reference.

401. Secondary liability attaches under North Carolina common law and statute (N.C.G.S. § 78A-56(c)).

402. Plaintiffs as the result of defendants' wrongful actions have suffered the damages, and demanded the relief, described at the end of this complaint.

Negligence Claims against Directors and Officers for Permitting Securities Violations:

COUNT 15: NEGLIGENCE

440A. PLAINTIFFS REPEAT AND REALLEGE ALL PRECEDING ALLEGATIONS IN THIS COMPLAINT IN CONNECTION WITH BAKKER, TAGGART, AND CORTESE ONLY, IN THE ALTERNATIVE.

440B. BAKKER, TAGGART, AND CORTESE WERE NEGLIGENT IN THEIR CONDUCT AND/OR COMMITTED NEGLIGENT MISREPRESENTATION AND OMISSION, IN THEIR PTL ACTIVITIES AS DIRECTORS AND OFFICERS (I) IN CONNECTION WITH THE FOREGOING CONDUCT, TRANSACTIONS, AND OCCURRENCES (LIFETIME PARTNERSHIP FRAUD, DONOR FRAUD, FORMER OFFICER EMBEZZLEMENT, AND SECURED CREDITOR (CONSTRUCTION) EMBEZZLEMENT), AND (II) IN CONNECTION WITH VIOLATIONS OF THE FOREGOING STATUTES AND LEGAL RIGHTS (FEDERAL AND NORTH CAROLINA RICO, NORTH AND SOUTH CAROLINA TIMESHARE LAWS, FEDERAL AND NORTH AND SOUTH CAROLINA SECURITIES LAWS, AND NORTH AND SOUTH CAROLINA COMMON LAW FRAUD AND OTHER COUNT 13-14 STATUTES).

440C. SAID NEGLIGENCE AND/OR NEGLIGENT MISREPRESENTATION/OMISSION

CONSISTED OF THE FOLLOWING: (I) CORTESE, BAKKER, AND TAGGART OWED A DUTY OF CARE AND OTHER FIDUCIARY DUTIES TOWARD THE LIFETIME PARTNERS, TOWARD PTL, AND TOWARD THEIR RESPONSIBILITIES AS DIRECTORS AND/OR OFFICERS OF PTL; (II) THEY VIOLATED THOSE DUTIES BY MOST OR ALL OF CORTESE'S MATERIAL ACTIONS AND OMISSIONS, AND SOME OF BAKKER'S AND TAGGART'S MATERIAL ACTIONS AND OMISSIONS, INCLUDING WITHOUT LIMITATION NOT DISCOVERING OR CORRECTING LIFETIME PARTNERSHIP FRAUD, DONOR FRAUD, FORMER OFFICER EMBEZZLEMENT, AND SECURED CREDITOR (CONSTRUCTION) EMBEZZLEMENT; (III) CORTESE'S, BAKKER'S, AND TAGGART'S NEGLIGENT ACTIONS AND OMISSIONS PROXIMATELY CAUSED INJURY TO THE LIFETIME PARTNERS, WHO WERE INDUCED TO INVEST IN LIFETIME PARTNERSHIPS AND THEN DEPRIVED OF THE BENEFITS OF THOSE PARTNERSHIPS, WHO JUSTIFIABLY RELIED ON BAKKER'S, TAGGART'S, AND CORTESE'S PROPER DISCHARGES OF THEIR DUTIES, AND WHOSE RELIANCE WAS REASONABLY FORESEEABLE;

440D. SAID NEGLIGENCE AND/OR NEGLIGENT MISREPRESENTATION/OMISSION VIOLATED NORTH CAROLINA STATUTES AND COMMON LAW, AND SOUTH CAROLINA STATUTES AND COMMON LAW.

No. 94-1130 (2)

Supreme Court, U.S.
FILED
JAN 26 1995
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH W. TEAGUE AND HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, SWANNEE BECK AND KAREN PEREZ TUCKER, Lifetime Partners of PTL, As Representatives of a Nationwide Class Consisting of 150,000 PTL Lifetime Partners and of 27,839 Persons Who Partially Paid for Lifetime Partnerships,

Petitioners,

v.

JAMES O. BAKKER, DAVID A. TAGGART, AIMEE CORTESE AND DELOITTE, HASKINS & SELLS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

The Petition For Writ Of Certiorari does not present any questions of law that merit review by this Court.

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INTRODUCTION

The Petition For Writ of Certiorari (the "Petition") is replete with inaccuracies and omissions.[1] Petitioners' assertion that the Fourth Circuit erred by ignoring their primary fraud claims against Respondents Deloitte, Haskins & Sells ("Deloitte") and David A. Taggart ("Taggart") is simply untrue. As shown below, Petitioners affirmatively elected not to submit to the jury any issues on any such primary claims against these Respondents. As a result, no such claims were appealed to or considered by the Fourth Circuit.[2] Similarly, their contention that the Fourth Circuit erroneously applied the holding of Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S.Ct. 1439 (1994) in dismissing Petitioners' fraud claims against Deloitte and Taggart and their gross negligence claims against Taggart and Respondent Aimee Cortese ("Cortese") is incorrect. Throughout the Petition, Petitioners ascribe conclusions to the lower courts not reached, mischaracterize the lower courts' decisions, and omit critical facts relating to the trial of this case and the jury charge.

STATEMENT OF THE CASE

A. Course of Proceedings.

Petitioners' claims against Deloitte, Cortese and Taggart, and against non-Respondent James O. Bakker ("Bakker"), were tried before a jury from October 24, 1990 through December 4, 1990. By

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[1] Respondents recognize the unusual frankness of their statements concerning the accuracy of the Petition, but also recognize their obligation to bring these matters to the Court's attention. See Supreme Court Rule 15.1. Instances of misstated or omitted facts, inaccurate statements and similar matters are referenced throughout this Brief in Opposition.

[2] Petitioners have failed to heed the Fourth Circuit's admonition that Petitioners "should remember that '[j]udges are not like pigs, hunting for truffles buried in briefs.' A client's interests are not furthered by drafting briefs which serve to camouflage legal issues." Teague v. Bakker *et al.*, 35 F.3d 978, 985 n.5 (4th Cir. 1994) (citation omitted).

directed verdict on December 5, 1990, the trial court ruled that the lifetime lodging rights ("Partnerships") acquired by Petitioners through Bakker's organization, PTL, were not "securities" (thereby dismissing Petitioners' federal and state securities claims).[3] On December 7, 1990, the jury received instructions agreed upon by the parties (subject to limited exceptions) and special interrogatories agreed upon by the parties (with no exceptions). The jury rendered its verdict on December 14, 1990 and judgment was entered on January 4, 1991.

The jury found that Bakker committed common law fraud, but did not violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), N.C. Gen. Stat. §§75D-1 *et seq.* ("NC RICO") or S.C. Code Ann. §§27-32-10 *et seq.* ("SC Timeshare Act"); that Deloitte neither aided and abetted nor conspired in Bakker's common law fraud; and that neither Taggart nor Cortese was grossly negligent.[4]

Petitioners' motion for a new trial or to alter or amend the judgment was denied on May 15, 1991. See a-1. The Fourth Circuit reversed the directed verdict, holding that "we cannot conclude, on the record before us, that the [Partnerships] are not securities. Such a determination is properly made by a jury," Teague, 35 F.3d at 990,[5] and remanded the case for re-trial of the securities claims against Bakker only. It affirmed the trial court's judgment in all other

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[3] As shown below, the only securities claims Petitioners asserted against Deloitte and Taggart at any point in this case were aiding and abetting and conspiracy. Contained in the respective appendices are pertinent sections of the Joint Appendix ("a") and the trial transcript ("b").

[4] The jury answered each interrogatory presented, thereby also finding that neither Deloitte nor Taggart aided and abetted or conspired in any violation of RICO or NC RICO and that Deloitte did not aid and abet or conspire in any violation of the SC Timeshare Act. See a-3 to a-8.

[5] Petitioners' assertion that the Fourth Circuit held the Partnerships to be "securities," Petition at 1, 3 and 4, is incorrect.

respects. Petitioners' request for a rehearing *in banc* was denied on October 18, 1994.

B. Statement of Facts

The Petition's statement of facts is inaccurate. As occurred before the Fourth Circuit, Petitioners seek to retry unsupported contentions that were heard and rejected by the jury.[6] They ascribe to the Fourth Circuit conclusions it did not reach by quoting snippets of the court's discussion of their allegations against Deloitte, without noting the evidence found by the jury to be explanatory and exculpatory, and intertwine with those quotations their, not the court's, conclusion that Deloitte culpably "covered up" Bakker's fraud. See, e.g., Petition at 5-6 and 10-11.

What the record shows is this. During the early 1980s, Deloitte audited PTL's financial statements and provided some non-audit services to PTL. See b-1; a-9 to a-11. Its last audit was of PTL's financial statements for the May 31, 1984 fiscal year. See b-1 to b-2. That audit report was dated August 31, 1984, the date on which Deloitte completed its audit field work, and also bore a second date, October 24, 1984, with regard to one financial statement note. See a-10; b-2.

Petitioners' claims principally related to PTL's Partnership program. One could become a "Partner" by giving varying sums to PTL, thereby receiving a right to lodging at PTL for a certain number of days per year for life. PTL initiated the program and construction of the first lodging facility in December 1983. See a-12. Deloitte was not involved in the program's development or initiation, nor even aware of it until early 1984. See b-1 to b-3.

The program was initially limited to 25,000 contributors. See b-3. As of May 31, 1984, the end of the last fiscal year audited by

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[6] The Fourth Circuit noted: "Appellants, in effect, ask us to retry issues already heard and ruled upon by a jury. This we will not do. It is indeed a rare case where we will second-guess both the jury and the district court in this regard. Nothing in this case...warrants such action... ." Teague, 35 F.3d at 994 (footnote omitted).

Deloitte, approximately 17,000 Partnerships had been taken. See b-3 to b-5. In September 1984, after the date of its audit report, Deloitte was informed by PTL's Vice President-Finance that PTL planned to expand the program through a second facility, see a-13, and to make available an additional 30,000 Partnerships, thereby increasing the potential number of Partners to 55,000, see b-5 to b-6. PTL added note 7 to its 1984 financial statements, referenced by the October 24, 1984 "dual" date in Deloitte's audit report, expressly describing this expansion. See a-14. On September 17, 1984, Bakker announced the expansion on television. See a-15, a-16.

After its 1984 audit, other than some non-audit services provided for a short time, Deloitte had no further involvement with PTL. See b-6 to b-7. It was succeeded by another national accounting firm.

The evidence fully supported the jury's verdicts as to Deloitte. There was no evidence that Deloitte acted with fraudulent intent in any instance. See, e.g., b-7 (Petitioners' own expert stated he found no evidence of intentional wrongdoing), b-8 to b-10. Richard Dortch (a director, the Audit Committee Chairman, and the Executive Vice President of PTL), Peter Bailey (PTL's Vice President-Finance), and John Yorke (a PTL outside lawyer in 1983 and 1984), all stated that they were not aware of any improper conduct by Deloitte. See b-10 to b-12. No Partner testified that he or she had read or relied upon any financial statements audited or any document prepared by Deloitte. See b-13 to b-15. No client or attorney representation letter received by Deloitte in its 1984 audit mentioned that the Partnerships were "oversold;" that the IRS had identified private inurement as an issue, or that such inurement in fact existed; or that the Partnerships were timeshares or securities. See b-15 to b-31; a-17 to a-20, a-21 to a-23. Deloitte was never otherwise informed that the IRS had identified private inurement as an issue, nor did Deloitte ever conclude that inurement existed. See b-31 to b-35.[7] Indeed, PTL's own tax counsel believed as late as 1987 (two years after

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[7]PTL's 1984 financial statements disclosed that the IRS was auditing PTL and correctly stated that no issues had been identified at that time. See a-24.

Deloitte's PTL engagement had ended) that PTL would prevail on any inurement claim. See b-35 to b-36, b-93. No Partnership oversales occurred during any year Deloitte audited PTL's financial statements. See b-4 to b-5, b-37 to b-38. PTL itself did not generate any reports of the number of Partnerships acquired until sometime in 1985. See b-38 to b-41. Deloitte was never informed that oversales may have occurred. See b-38 to b-41. Bailey provided to Deloitte projections he believed were valid and accurate, intending that Deloitte rely on them in deciding not to issue a going concern qualification. See b-43 to b-44. PTL in fact continued as a going concern until June 1987. See b-44 to b-45. Deloitte was never informed that Partnerships were either securities or timeshares. See b-45 to b-50.

Respondent Cortese is the pastor of a New York church. Dortch asked her to join PTL's Board in 1979, but she initially declined because she lacked any substantial financial or management experience or training. See b-50 to b-51. Dortch persisted because she had other important qualities, including her status as a northern Hispanic female. She reluctantly agreed, serving from 1980 through early 1987.

Cortese relied heavily on the other directors, particularly Dortch, who had greater financial and business sophistication. See b-51 to b-54. She voted in favor of a matter only when her concerns were satisfied by consultation with other directors. See b-54. During her tenure, Board approval of each material matter, including the Partnership program, was preceded by Dortch's or Bakker's specific assurance that it had been reviewed and approved by PTL's attorneys. See b-54 to b-56.[8]

It was uncontroverted at trial that Cortese was never told and did not know about: any possible timeshare or securities law violations, b-55; IRS concerns about private inurement and PTL's tax exempt status, b-55 to b-57; oversales of Partnerships, b-57; the use of Partnership funds to pay Bakker's bonuses, id.; or alleged "going

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[8] In fact, Cortese acquired a Partnership. See b-56.

concern" issues, id. Indeed, Petitioners' own witness testified that Dortch and Bakker conspired to conceal these matters from the outside directors. See b-57 to b-59.

Cortese argued that she was deceived by Bakker and Dortch. The jury agreed. In denying Petitioners' motion for a new trial and granting Cortese her costs, the trial court characterized her as "a victim of fraud" and condemned Petitioners' case against her as being "virtually non-existent:"

> [A]lthough the court declined to grant...Cortese's motion for directed verdict, it indicated (to counsel) that if the jury were somehow to find her liable, the Court would enter a judgment for...Cortese notwithstanding the jury verdict. As to Cortese, this case was neither close nor difficult.

See a-2 (emphasis added).

Respondent Taggart was one of about ten non-executive "vice presidents" of PTL. See b-59 to b-61. He was not a PTL director or corporate officer, and he had no management responsibility: Bakker and Dortch were PTL's only controlling officers, b-62 to b-63; Taggart was not a PTL control person, b-63; every "vice-president" reported to Bakker and/or Dortch, b-60; and Taggart exercised no authority at PTL, except as Bakker's personal valet and messenger through whom Bakker directed the conduct of some PTL employees, b-60 to b-62. According to Dortch, Taggart did not participate in the Partnership program. See b-63. Petitioners asserted that Taggart engaged in fraud and gross mismanagement, but offered no evidence that he had any responsibility for PTL's management or that he acted with fraudulent intent.

SUMMARY OF REASONS FOR DENIAL OF THE PETITION

The Petition presents no issue meriting review by this Court. No aspect of the Fourth Circuit's decision conflicts with a decision of another United States court of appeal on the same matter, decides a federal question in a way contrary to a state court of last resort, or decides an important question of federal law in a way that conflicts

with applicable decisions of this Court. See Supreme Court Rule 10.1(a). The Petition is but an attempt to assert claims not tried to the jury, to retry on appeal contentions already rejected, and to evade the decisions of the lower courts mandated by this Court's opinions and applicable state law.

The Petition misstates the Fourth Circuit's holding. That court did not overextend the holding of Central Bank to dismiss "primary claims" against Deloitte. There were none. Petitioners affirmatively abandoned all primary fraud claims against all defendants other than Bakker. Moreover, the Fourth Circuit did not apply, much less misapply, Central Bank in affirming the rejection of Petitioners' gross negligence claims against Taggart and Cortese. Thus, Petitioners' argument to this Court that the Fourth Circuit wrongly applied Central Bank to their claims is baseless.

Petitioners also attack certain jury instructions. Some of these challenges were made before the Fourth Circuit; others are raised for the first time in the Petition. Still others were not objected to at trial, were agreed to, jointly proposed or even authored by Petitioners. Petitioners waived their right to challenge these instructions. Even if this were not true, the Petition would not merit review. As the Fourth Circuit held, the trial court's charge contained no prejudicial error.

REASONS FOR DENIAL OF THE PETITION

Petitioners contend that the Fourth Circuit overextended or misapplied this Court's recent ruling in Central Bank to their "primary liability" and "director negligence" claims, wrongly created a doctrine of Rule 10b-5 "auditor immunity," and erroneously upheld the instructions on RICO, NC RICO and the common law fraud statute of limitations, thereby letting the trial defendants "off the hook" and "immunizing" Deloitte. These arguments are without merit.

A. THE FOURTH CIRCUIT DID NOT ERR IN APPLYING CENTRAL BANK

1. ***Petitioners Abandoned Their Primary Fraud Claims Against Deloitte and Taggart.*** Petitioners' contention that the Fourth Circuit "overextended" Central Bank to bar their primary fraud claims against Deloitte and Taggart or "simply ignored" or "overlooked" these claims is nothing more than a blatant attempt to obscure the fact that, at trial, Petitioners did not request submission to the jury of primary fraud instructions or issues as to Deloitte or Taggart. Indeed, they affirmatively abandoned their primary fraud claims against Deloitte before the commencement of trial on October 24, 1990 and, subsequently, against Taggart as well. Before requesting a rehearing by the Fourth Circuit, Petitioners never contended otherwise.

Petitioners' Proposed Jury Instructions and Jury Issues, dated October 5, 1990, as modified, requested the following instructions:

(i) "The plaintiff...class claims that Rule 10b-5 was violated by Bakker, aided and abetted by Deloitte... ." (See a-25);

(ii) " ... that defendant Bakker made the following material [misrepresentations], which violated Rule 10b-5(B)... . Furthermore, the ... class also alleges that...Deloitte...aided and abetted these...frauds... ." (See a-25 to a-26);

(iii) "The plaintiff...class claims that a violation of Rule 10b-5 was aided and abetted by...Deloitte..." (See a-27);

(iv) "An accountant may be liable as an aider and abettor if it knows, or is reckless in not knowing, that its client has committed a primary violation..." (See a-28); and

(v) "The plaintiff...class alleges that defendants Bakker and/or Taggart violated the [state] securities law..., and that...Deloitte... aided and abetted... in those violations." (See a-29).

In his opening statement to the jury, Petitioners' lead trial counsel, Thomas T. Anderson, stated:

> We are suing...Deloitte...on the basis they aided and abetted the management fraud of Jim Bakker and David Taggart. That's the case. In order to sustain our burden of proof on the aiding and abetting, we have to prove that the auditors had knowledge of the management fraud, and we will do it. And that they substantially assisted the management of fraud, and we will do it.

See b-63 to b-64.

* * * * *

> So, in summary, we are going to show in this case the management fraud of Jim Bakker and David Taggart... . Our evidence will show that the auditors aided and abetted in seven separate areas. ... Our evidence will show in the absence of that aiding and abetting, we wouldn't be here.

See b-64. He did not state that Petitioners would attempt to prove Deloitte was a primary violator under any theory. See, e.g., b-64 to b-66.

Upon the conclusion of Petitioners' case-in-chief on November 20, 1990, Deloitte moved for a directed verdict. In opposing the motion, Wendell R. Bird, Petitioners' counsel of record before this Court, argued only that there was evidence of Deloitte's alleged aiding and abetting that should go to the jury. See b-66 ("[i]t was their aiding and abetting that made it possible..."); id. ("[u]nder RICO we have claimed that [Deloitte] is guilty of aiding and abetting"); b-66 to b-77 ("we...suggest aiding and abetting [by Deloitte] is amply demonstrated. It is a jury issue, ready to go to the jury").

Petitioners' Revised Proposed Jury Instructions, filed November 26, 1990, omitted proposed primary fraud claims against Taggart and reiterated that Deloitte was not so charged:

(i) "The plaintiff...class claims that Rule 10b-5 was violated by defendant Bakker, aided and abetted by Deloitte... ." (See a-31 to a-32);

(ii) "The plaintiff...class claims that a violation of Rule 10b-5 was aided and abetted by defendant Deloitte... ." (See a-33); and

(iii) "The plaintiff...class alleges that defendant Bakker violated [state] securities laws..., and that... Deloitte... aided and abetted those violations... ." (See a-34).

On December 3, 1990, just prior to the close of evidence, Petitioners filed their Final Proposed Jury Instructions, again confirming that they tried their case against Deloitte only under secondary liability theories: *"[Plaintiffs claim that...Bakker violated Rule 10b-5. ... [and] that...Deloitte... aided and abetted that violation....]."* See a-35, a-36 (italics in the original).

On December 3, 1990, Petitioners filed their Stipulation of Issues Not To Be Submitted to the Jury In This Trial. See a-37 to a-38. The cover letter to counsel for the Respondents and Bakker accompanying service of the Stipulation, dated November 30, 1990 and signed by Petitioners' counsel, read as follows:[9]

> As we promised, we write to seek to clarify the issues that we do and do not intend to submit to the jury.
>
> The issues that we do intend to submit to the jury are the following, and the nature of our claims against each party is indicated below. We expect our jury issues, instructions, and contentions will match this list, but expressly state that this list is our present intention subject to

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[9] This letter, which is appended as Appendix "c," was not filed with the trial court and, because Petitioners did not contend they tried primary fraud claims against Deloitte or Taggart until their petition for rehearing to the Fourth Circuit (to which Respondents were not required to respond), it was not part of the Joint Appendix.

(unlikely) change, rather than a stipulation.

Claim (T is Taggart)	*Primary Fraud*	*Conspiracy*	*Aiding & Abetting*	*Negligence*
A. FEDERAL RICO	Bakker	Deloitte/T	Deloitte/T	
B. NORTH CAROLINA RICO	Bakker	Deloitte/T	Deloitte/T	
C. FEDERAL SECURITIES	Bakker		Deloitte	
D. STATE SECURITIES	Bakker	Deloitte	Deloitte	
E. STATE TIMESHARE	Bakker	Deloitte	Deloitte	
F. STATE FRAUD	Bakker	Deloitte	Deloitte	
G. STATE NEGLIGENCE				Cortese/T

Petitioners filed Proposed Jury Issues on December 3, 1990 which conformed to the statements in their November 30th letter.[10] For example:

(i) "Do you find from a preponderance of the evidence that the following defendant was guilty of a violation of Rule 10b-5... ?
ANSWER:
Bakker did violate it: _____
Bakker did not violate it: _____

(ii) What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff...class for its damages, if any, proximately caused by one or more defendants' violation of Rule 10b-5. ...?
ANSWER:
The following portion of the above amount (all, part or none) was proximately caused by Deloitte...through aiding and abetting Bakker's violation of...Rule 10b-5: $___."[11]

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[10] This document does not appear in the Joint Appendix for the same reason described in footnote 9. It is appended as Appendix "d."

[11] Aiding and abetting issues also were proposed regarding Deloitte and Taggart under Petitioners' RICO and NC RICO theories, and as to Deloitte under their SC Timeshare Act, state securities and common law fraud claims. Conspiracy issues were requested as to Deloitte under the RICO, NC RICO, state securities, SC Timeshare Act and common law fraud claims, and as to Taggart under the RICO and NC RICO claims.

No primary fraud issue was proposed as to Deloitte or Taggart. Similarly, Petitioners' Substitute Jury Instructions on Federal Securities Aiding and Abetting, filed on December 5, 1990, requested only aiding and abetting instructions regarding Deloitte. See a-39 to a-45. Indeed, Petitioners assented to the issues submitted to the jury. See b-68.

On December 5, 1990, Deloitte moved for a directed verdict on all claims. Deloitte's counsel stated:

> [A]s I understand it now, the primary fraud claims are gone against Deloitte. They don't say that Deloitte engaged in a fraud, they say Deloitte aided and abetted fraud, fraud by Mr. Bakker.

See b-68. In response, Mr. Bird, Petitioners' counsel, did not contend otherwise:

> In response to what he said, plaintiffs would suggest that Mr. Bakker's fraud was not possible without Deloitte, Haskins & Sells aiding and abetting.

See id.

* * * * *

> While we believe we have proved fraud, to simplify this case, we have proposed jury instructions that only charge conspiracy and aiding and abetting of the fraud by Deloitte, and we feel the evidence is abundant to let it go to the jury.[12]

See b-68 to b-69.

Petitioners' Brief to the Fourth Circuit underscores their abandonment of primary fraud claims. The Statement of Facts recites Bakker's alleged primary fraud. The second section, entitled "Deloitte's and Taggart's Aiding and Abetting Made Bakker's Fraud Possible," first describes Deloitte's purported aid and then alleges that "Taggart also aided and abetted the wrongdoing." The remainder of the Brief alleges error as to Bakker's primary violations and later Deloitte's and Taggart's alleged aiding and abetting. The Brief is

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[12] In the final charge conference, Mr. Bird proposed changes to the jury instructions to identify Bakker as the only alleged primary violator and affirmed that these changes reflected Petitioners' case. See b-69.

devoid of any alleged error regarding primary fraud claims "tried" as to Deloitte or Taggart.

In short, Petitioners did not try primary fraud claims against Deloitte and Taggart. They could not prove those claims and, accordingly, elected to charge those defendants under the "more far-reaching" and "shifting" aiding and abetting theory ultimately rejected in Central Bank. Even under that expansive theory, they were unable to prove their case, a judgment upheld by the Fourth Circuit.

It is well-settled that a party's failure to request an instruction on a particular legal theory precludes any subsequent challenge as to that omission. See Walker v. Action Industries, Inc., 802 F.2d 703, 710-11 (4th Cir.), cert. denied, 479 U.S. 1065 (1986); Bissett v. Ply-Gem Indus., Inc., 533 F.2d 142, 145 (5th Cir. 1976); Charles A. Wright *et al.*, Federal Practice and Procedure §2552, at 384-85. Moreover, litigants waive any right to challenge any instruction to which they did not specifically object. See Fed. R. Civ. P. 51; City of Springfield v. Kibbe, 480 U.S. 257, 258 (1987). Petitioners did not request that the jury be instructed on primary fraud claims as to Deloitte and Taggart and thereafter did not object to this omission. Furthermore, it is well-settled that Petitioners cannot assert error as to claims abandoned at trial. See Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 116 (3rd Cir. 1992), cert. denied, 113 S.Ct. 1645 (1993).

Finally, this Court consistently has refrained from reviewing questions not raised or litigated in the lower courts. See Price Waterhouse v. Hopkins, 490 U.S. 228, 238 n.5 (1989); Heckler v. Campbell, 461 U.S. 458, 468-69 n.12 (1983). Petitioners did not raise this issue at trial or before the Fourth Circuit. Their request to litigate discarded claims presents no issue warranting review.

2. ***The Fourth Circuit Acted Properly In Retroactively Applying Central Bank.*** Petitioners next argue that the Fourth Circuit erred in retroactively applying Central Bank, thereby barring their aiding and abetting claims against Deloitte and Taggart. See Petition at 16-17. Petitioners scarcely dedicate a paragraph to this argument, and with

good reason. The circuit court, in rendering its decision in the fall of 1994, was totally justified in applying Central Bank, handed down in the spring of 1994. As most recently noted by the Court, "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." Harper v. Virginia Dep't of Taxation, 113 S.Ct. 2510, 2516 (1993) (summarizing the holding of James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991)). Thus, "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." Id.[13]

In Central Bank, the Court retroactively applied the holding in that case to the parties to the controversy. See Central Bank, 114 S.Ct. at 1455 (reversing the Court of Appeals and reinstating the district court's grant of summary judgment on the basis of aiding and abetting liability). Therefore, the Fourth Circuit was entirely justified in applying Central Bank in the instant case. See also Reed v. Mokena Sch. Dist., __ F.3d __, 1994 WL 675690 (7th Cir. 1994) (applying Harper and barring IDEA action on basis of prior Seventh Circuit case that applied 120-day limitations period in that case); Lufkin v. McCallum, 956 F.2d 1104 (11th Cir.) (applying Beam and barring Section 1983 action on basis of Owens v. Okure, 488 U.S. 235 (1989), which ruled on proper limitations period for Section

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[13] The Court's pronouncements on retroactivity have been the subject of disagreement among the Justices. However, in Harper, Justice O'Connor, writing in dissent in which the Chief Justice joined, summarized the Court's position as follows:

> [E]ven though there was no majority opinion [in James B. Beam], one can derive from that case the proposition the Court announces today: Once 'this Court applies a rule of federal law to the parties before it, that rule...must be given full retroactive effect in all cases still open on direct review.'

Id. at 2527 (O'Connor, J., dissenting) (citation omitted). Therefore, the Court's position enunciated by Justice Thomas for the Harper Court accurately reflects the law on this question.

1983 actions and applied new rule to the parties), cert. denied, 113 S.Ct. 326 (1992); York Assoc., Inc. v. Secretary, Dep't of Housing and Urban Dev., 845 F. Supp. 24 (D.D.C. 1994) (canvassing recent Supreme Court cases on retroactivity and refusing motion to amend judgment to make it nonretroactive).

Petitioners find significance in Central Bank's rejection of the prevailing view in the circuit courts that Rule 10b-5 aiding and abetting claims were permissible. This insight is of no moment whatsoever. The Beam Court expressly considered and rejected the use of equitable considerations as a basis for limiting the retroactive effect of a new decision. See Beam, 501 U.S. at 542-43.

3. ***The Fourth Circuit Properly Affirmed The Jury's Verdict Denying Petitioners' Gross Negligence Claims.*** Petitioners argue that the jury's rejection of their state law gross negligence claims against Taggart and Cortese should be overturned because North Carolina law required only a simple negligence charge. Both the lower courts summarily rejected this assertion based on controlling North Carolina authority. See Teague, 35 F.3d at 995. Accordingly, Petitioners' argument is completely disingenuous.

The Teague court correctly held that the negligence standard underlying Petitioners' claims was controlled by North Carolina authority and found, again correctly, that an express statement of the North Carolina Supreme Court mandated that a gross, rather than ordinary, negligence standard be applied to those claims. Id. at 995 (discussing Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1989)).[14] Hence, a purely state law issue was properly decided on the basis of state law authorities.

Petitioners' attempt to force their gross negligence issue within the ambit of Central Bank is also contrary to the clear procedural history of this case as it relates to Taggart and Cortese. On December 13, 1990, the day before the return of the jury verdict, Petitioners

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[14] Petitioners ignore that they had previously stipulated that North Carolina law controlled their negligence claims. See a-47 to a-48.

stipulated to the dismissal with prejudice of all of their securities claims against Taggart and Cortese. See a-46, a-61. Thus, even if Petitioners had a valid legal theory upon which they could possibly resurrect securities claims against Taggart and Cortese based on allegations of negligence, those claims would be barred by their own stipulation.[15]

Petitioners, not the Fourth Circuit, incorrectly overextend Central Bank's holding to their negligence claims against Taggart and Cortese. Their argument in this regard is wholly specious.

B. THE FOURTH CIRCUIT'S DECISION IN NO WAY CONFLICTS WITH THIS COURT'S HOLDINGS OR THOSE OF OTHER CIRCUITS WITH REGARD TO ACCOUNTANT PRIMARY LIABILITY

Petitioners' second theory of error is that the trial court wrongly dismissed their "primary claims" against Deloitte by "ignoring false certification of PTL's financial statements, and by implying immunity for accounting firms." See Petition at 17. This is but a reiteration of their first argument. As shown above, Petitioners decisively abandoned and waived any primary claims against Deloitte. However, even assuming *arguendo* that Petitioners did not abandon and otherwise waive their "primary claims," their argument is entirely devoid of substantive merit.

Petitioners assert that Deloitte should have been found liable as a primary violator for the sole reason that it issued audit reports on PTL's financial statements; they further accuse the Fourth Circuit of "straining" to "immunize" Deloitte from this liability. See Petition at 23 n.11. Petitioners advance this false shibboleth of "auditor immunity" to impute the existence of a strict liability doctrine

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[15] In their stipulation, Petitioners also dismissed with prejudice all timeshare and common law fraud claims against Taggart. Moreover, negligence is not sufficient to satisfy the scienter element of any of Petitioners' RICO, NC RICO, securities, timeshare or common law fraud claims against Taggart.

allegedly "ignored" by the Fourth Circuit. See Petition at 12-13, 17-20 and 23.

Petitioners accuse the circuit court of overlooking Central Bank's observation that accountants can be liable under Rule 10b-5. The Fourth Circuit did not overlook nor does Deloitte challenge the obvious principle of law that an accountant may be liable as a Rule 10b-5 primary violator if he makes a material misstatement or omission of fact with scienter to a plaintiff with whom he has a duty relationship that causes that plaintiff to make an investment decision and to suffer a resulting loss. Petitioners, however, somehow infer from Central Bank that for liability to attach to an accountant, a plaintiff need only prove one element -- a misrepresentation by anyone. Thus, they theorize that if an accountant issues an audit report on a company's financial statements, the accountant is to be held strictly liable as a "public watchdog" if those financial statements were materially misleading. This is not the law:

> Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be a primary violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met.

Central Bank, 114 S.Ct. at 1455. The Fourth Circuit's judgment does not conflict with Central Bank.[16]

Petitioners also contend that United States v. Arthur Young & Co., 465 U.S. 805 (1994) supports their strict liability theory. See, e.g., Petition at 17-18. Arthur Young & Co. did not involve an audit of financial statements, a fraud claim against the auditors or even a private civil action. It was an IRS enforcement action to require an accounting firm to surrender tax accrual workpapers developed by it in connection with the tax accounting of a "public" corporation. The corporation sought to invoke the accountant-client privilege to

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[16] Petitioners' theory does not answer how a defendant, such as Deloitte or Taggart, found by a jury not to have aided and abetted a fraud could be found to have primary liability for that same fraud.

prevent such access. This Court held that our federal tax system requires disclosure of relevant information by all taxpayers to the IRS. In dicta, the Court further stated that the accountant-client privilege is outweighed by the need of the IRS to have access to an accountant's independent work product. Petitioners' attempt to import the "public watchdog" dicta of Arthur Young & Co. into the body of Rule 10b-5 law has no basis. The Court's ruling in that case is simply not relevant. Were it otherwise, this Court would have addressed Arthur Young & Co. in Central Bank. It did not.

Next, Petitioners claim that the Fourth Circuit's "effective immunization" of Deloitte violated the principles of Reves v. Ernst & Young, 494 U.S. 56 (1990) ("Reves I") and Reves v. Ernst & Young, 113 S.Ct. 1163 (1993) ("Reves II"). Petition at 19-21. They contend these cases upheld a Rule 10b-5 and RICO strict liability doctrine for auditors for "false certification" of financial statements. This contention is simply wrong.

In Reves I, this Court addressed the issue of whether variable rate promissory notes offered and sold by an agricultural cooperative through a public marketing effort were "securities." No other issue was decided by the Court. This case did not uphold "auditor liability for false certification." Petition at 19. The Fourth Circuit's decision does not conflict with Reves I.

In Reves II, this Court addressed a RICO Section 1962(c) primary claim against the cooperative's auditor by the holders of the cooperative's notes and others. The district court granted summary judgment on the ground that the auditing of an entity and the issuance of an audit report on its financial statements do not "satisfy the degree of management required" for a finding of RICO primary liability. Reves II, 113 S.Ct. at 1168. The circuit court affirmed this application of the Section 1962(c) "operation or management" test.

This Court affirmed the circuit court's judgment. It did not hold that auditors are strictly liable under RICO if they "certify" financial statements containing material misrepresentations. To the contrary, although "outsiders," including auditors, may be primary violators of Section 1962(c), they must be proven to have satisfied all requisite elements of a claim, including that they be "associated with" an

enterprise and participate in the conduct of its affairs -- that is, "participate in the operation or management of the enterprise itself." Id. at 1172-73. Teague does not conflict with Reves II.

In short, Petitioners' argument is nonsensical and misleading, and its conclusions are flatly wrong. The Fourth Circuit correctly followed this Court's mandate in Central Bank in rejecting Petitioners' Rule 10b-5 and state securities law aiding and abetting claims.

C. THE FOURTH CIRCUIT'S DECISION IN NO WAY CONFLICTS WITH THE OPINIONS OF THIS COURT OR OTHER CIRCUIT COURTS WITH REGARD TO THE TRIAL COURT'S JURY INSTRUCTIONS

As they did before the Fourth Circuit, Petitioners assert that certain jury instructions were erroneous. At trial, they stated "for the record"[17] only three objections: to the description of RICO and NC RICO predicate acts as "crimes" and "criminal," b-69; to the NC RICO aiding and abetting reasonable doubt standard charge, b-69 to b-70; and, to the RICO Section 1962(a) charge on "acquiring an interest," b-70 to b-71. Each was denied and all parties stated they had no further objections. See id.[18] The Fourth Circuit examined the jury charge and found it to be proper. Teague, 35 F.3d at 994.

1. ***The Trial Court's RICO And NC RICO Intent Instructions Were Correct.*** Petitioners contend that the trial court erroneously instructed that, to be liable under RICO, Deloitte and Taggart must have acted with "specific criminal intent" as aiders and abettors and

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[17] The trial court warned Petitioners to "[g]o by the rules, whatever the Federal Rules provide" in stating their objections to its jury instructions. See b-69.

[18] The trial court later noted that "there is a serious question whether all parties have waived any objections or exceptions to the instructions as given by the Court." See a-49.

with "criminal intent" as conspirators. Petition at 20 and 25-27. The trial court charged the jury not that Deloitte and Taggart must have acted with "criminal intent" as aiders and abettors, but, verbatim as requested by Petitioners, b-71 to b-74, with a "specific intent to do something the law forbids or with a specific intent to fail to do something that the law required to be done," compare b-74 to b-76 with a-50 to a-51, a-52.

Petitioners' complaint about an alleged infirmity in an instruction they themselves proposed is meritless. Parties may not propose or otherwise agree to instructions given and then assert error in those instructions before the appellate court. Clausen v. Sea-3, Inc., 21 F.3d 1181, 1195-96 (1st Cir. 1994); Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1493 (9th Cir. 1986). Moreover, they continue to ignore the reality that the jury found no primary RICO violation by Bakker. Thus, any alleged error in the RICO aiding and abetting instructions was immaterial. Teague, 35 F.3d at 995 n.23.

Petitioners' attack on the RICO conspiracy intent charge is also unfounded. The phrase "criminal intent" was mentioned only once in these instructions. See b-75. The jury was repeatedly charged that a conspirator must be found to have acted only with a "specific intent." See b-75 to b-77. Moreover, the RICO conspiracy issues submitted to the jury asked "did [Deloitte] [Taggart] knowingly and wilfully conspire with Bakker." See a-84 (Issues 10 and 11). In context, the single "criminal intent" instruction, even if erroneous, was harmless. Teague, 35 F.3d at 995 n.23.

Petitioners also allege error in the trial court's description of RICO and NC RICO predicate acts by the type of conduct they constitute (i.e., "crimes" or "criminal acts"), further implying that proof of criminal intent or of even a criminal conviction was required by the charge. The court's description accurately reflected the recognition by this Court that RICO describes predicate acts "by reference to criminal statutes." See Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479, 491 (1985).[19] Predicate acts "involve conduct that is...

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[19] NC RICO has the same basis. N.C. Gen. Stat. §75D-3(c)(1).

indictable ... under various criminal statutes." Id. at 488. A racketeering pattern constitutes two or more related predicate acts that amount to or pose a threat of "continued criminal activity." H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989). Numerous courts routinely use these descriptions. See, e.g., Avirgan v. Hull, 932 F.2d 1572, 1579 (11th Cir. 1991), cert. denied sub nom. Christic Inst. v. Hull, 112 S.Ct. 913 (1992); Brandenburg v. Seidel, 859 F.2d 1179, 1185 (4th Cir. 1988); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987). Indeed, Petitioners requested and received instructions to the same effect: "[w]hite collar businesses, as well as `organized crime'-type racketeers are liable if they violate RICO. The RICO Act is not limited to organized crime, but extends beyond organized crime." Compare b-77 with a-53 to a-54. The trial court scrupulously observed the standards established by this Court in describing the elements of RICO and NC RICO. As the Fourth Circuit found, the "jury instructions taken as a whole, fairly state[d] the applicable law in this regard." Teague, 35 F.3d at 995 n.23.

2. ***The RICO Standard of Proof Instructions Were Correct.*** Petitioners next assert that the trial court instructed that proof of a civil RICO violation had to be "beyond a reasonable doubt." Petition at 25. Again, they are wrong.

The trial court instructed that the preponderance of the evidence standard applied to Petitioners' primary, aiding and abetting and conspiracy claims under RICO at the outset of the RICO instructions, b-77, and then repeated that instruction over thirty times, e.g., b-77 to b-81. Once again, the Fourth Circuit was entirely justified in upholding the instructions on this basis. Teague, 33 F.3d at 994 n.23.

3. ***The NC RICO Standard of Proof Instructions Were Correct.*** Petitioners appear to argue that the trial court improperly instructed the jury on the proof standard for NC RICO. Again, they ignore the facts. During the charge conferences, Petitioners argued that the reasonable doubt standard was correct for Bakker's alleged primary

violation, but that the lower preponderance standard should be applied to their NC RICO secondary liability claims. Deloitte and Taggart understandably objected[20] and the court directed the parties to "negotiate" and jointly present an NC RICO charge. See b-81 to b-83. They did, and the jointly presented charge, which included a reasonable doubt standard for all NC RICO claims, was given. See b-83 to b-84. Therefore, Petitioners waived any right to appeal on this basis. See Clausen, 21 F.3d at 1195-96. Moreover, because the jury found no primary NC RICO violation by Bakker, any error is harmless. See Teague, 35 F.3d at 995 n.23.

Despite their agreement and joint proposal of these instructions, after the charge Petitioners moved to reinstruct the jury omitting the aiding and abetting reasonable doubt standard. Deloitte and Taggart responded then, as they do now, that to submit a secondary liability claim under a proof standard lower than that applied to a primary violator would be irrefutably prejudicial. See b-86 to b-88. Otherwise, alleged secondary violators, who by definition have a more tangential relationship with the alleged wrongdoing and whose behavior would not satisfy all of the requisite elements of a primary violation, would be exposed to more expansive liability than the alleged primary violator. The court denied Petitioner's motion.

Petitioners' continued espousal of a proof standard inversely related to the alleged degree of culpability is a prime example of the "bizarre" consequences, contemplated by this Court in Central Bank, that could result when unlegislated, hazy secondary liability theories are applied by the courts on an *ad hoc* basis. Their assertion of error is without merit.

4. ***The Fourth Circuit Properly Upheld the RICO Section 1962(b) Instructions.*** Petitioners next contend that the trial court instructed that only stock ownership in an enterprise would satisfy the Section 1962(b) "interest" element. Petition at 28-30. In a new

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[20] NC RICO does not provide for secondary liability. The trial court permitted these instructions to be submitted to the jury over the objections of Deloitte and Taggart.

twist, they assert the Fourth Circuit's rejection of their argument created a nonprofit corporation "loophole" designed to let Bakker, Deloitte and Taggart "off the hook." See id. at 28. Petitioners did not object to the Section 1962(b) instructions at trial and thus waived any right to assert error therein. See Fed. R. Civ. P. 51; Kibbe, 480 U.S. at 259; St. Paul Fire & Marine Insurance Co. v. Piedmont Natural Gas Co., Inc., 397 F.2d 263, 264 (4th Cir. 1968).

This waiver notwithstanding, the Fourth Circuit elected to address this challenge and expressly found that the court's instruction as a whole was proper and contained no such "equity interest" requirement:

> Plaintiffs argue that Section 1962(b) does not require direct equity interest ownership in the RICO enterprise as plaintiffs contend is required by the court's instruction to the jury that `[a]cquiring an interest in an enterprise means acquiring of [sic] stock or ownership equity, and not merely the existence of an employment relationship with the enterprise.' Tr. 8083-84. Further along in the instruction, however, the court instructed: `In order for you to find that plaintiffs have established [that Bakker acquired or maintained an interest in PTL], you must find that Bakker...gained actual day-to-day involvement in the management and operation of PTL.' Tr. 8086. We believe that this explanation sufficiently removed any thoughts the jury might have had that, to find that Bakker acquired an interest in PTL, it had to find that Bakker acquired an equity interest in PTL. We therefore reject plaintiff's argument. An analogous argument under NC-RICO similarly fails.

Teague, 35 F.3d at 995 n.23.

The Fourth Circuit was entirely correct in its assessment. The Section 1962(b) instruction, taken as a whole, accurately reflected the "acquiring an interest" principles enunciated in National Organization for Women, Inc. v. Scheidler, 114 S.Ct. 798 (1994). Moreover, the instruction did not, as Petitioners now assert, exempt nonprofit organizations from the reach of civil RICO. As noted, the

instructions did not require that an "equity interest" be found by the jury.

Petitioners' next contention is difficult to decipher. Petition at 29-30.[21] As noted above, the trial court instructed that the Section 1962(b) "interest" requirement was satisfied if Bakker was shown to have "actual day to day involvement in the management and operation of PTL." See b-89 to b-90. For reasons that are not apparent to Respondents, Petitioners now argue that the Fourth Circuit's holding is contrary to Reves II, 113 S.Ct. at 1173, where the Court stated that "the `operation or management' test that applies under subsection (c) in no way limits the application of subsections (a) and (b) to an `outsider.'" Petitioners conveniently ignore that the trial court in fact instructed the jury that "outsiders as well as insiders can be liable... . The substantive prohibitions of RICO apply to insiders and outsiders, those merely associated with an enterprise, who participate directly and indirectly in the enterprise's affairs... ." See b-77. Moreover, the trial court's instructions did not even imply, much less state, that Bakker had to be deemed an "outsider" if liability was to attach under Section 1962(b). In short, the Fourth Circuit correctly applied the relevant law and Petitioners' argument in this regard does not merit review by the Court.

5. ***Petitioners Waived Any Objection To The Statutes of Limitations Instructions; The Instructions Were Correct.*** Petitioners' challenge to the common law fraud statutes of limitations instructions is fatally flawed. They imply that the circuit court found that the trial court "actually acknowledged [its] error and agreed to reinstruct the jury (then declined to)." Petition at 22. The Fourth

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[21] Petitioners' argument that the Fourth Circuit read into RICO a requirement for reliance on each participant is also perplexing. Petition at 30. The Fourth Circuit made no reference to the reliance element of any claim other than in its quotation from Central Bank in discussing Petitioners' North Carolina securities law aiding and abetting claim. Teague, 35 F.3d at 991. Petitioners appear to challenge a requirement found in other Fourth Circuit opinions. If such requirement in fact exists, it is no way evident in, or relevant to, the case *sub judice*.

Circuit made no such observation and the trial court did not so acknowledge. Further, the focus of their argument -- that the trial court erroneously instructed that there was an "absolute 3-year period without any equitable tolling," Petition at 21, is untrue. The trial court charged that claims "respecting acts involving Lifetime Partnerships that occurred on or before November 16, 1984 are barred by the statute of limitations, *except as qualified in these instructions*." See b-90 (emphasis added).[22] The next paragraph began "[u]nless a qualification applies..." Id. The court then gave a two paragraph equitable tolling instruction. See b-90.

Petitioners not only authored the equitable tolling "qualification" in substantial part, they expressly agreed to the charge given. During a charge conference, Deloitte proposed that the SC Timeshare Act limitations instructions previously accepted by the parties be repeated at the end of the common law fraud charge. Petitioners agreed. See b-90 to b-91 (Line 12, "No objection").

After the jury charge, Petitioners asserted that the "qualification" given was not sufficiently emphasized and proposed "corrective" instructions, b-91 to b-92, that would have stated the charge given was "correct," but that the tolling qualification "may not have been clear," a-56 to a-57. After noting that the "qualification" instruction given was drawn virtually verbatim from Petitioners' proposed instructions, compare b-90 with a-58 to a-60, a-55, and that the "corrective" instructions proposed no substantive change, the trial court declined to re-instruct, b-92. Petitioners acquiesced, b-92 ("[a]ll right"), and later did not contest the instructions in their objections "for the record," b-69 to b-71. They thus waived their right to assert error on appeal. See Kibbe, 480 U.S. at 259; California v. Taylor, 353 U.S. 553, 556 n.2 (1957).

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[22] The "qualified" reference to November 17, 1984 as the start of the limitations period was based upon the three-year limitations period and the Complaint's filing date, November 17, 1987, not the "straining" of the Fourth Circuit to create "auditor immunity" for Deloitte, Petition at 23 n.11. Petitioners' own proposed instructions also used November 17, 1987 as the reference date. See a-55.

Before the Fourth Circuit, the Petitioners argued that although the instructions were accurate, the second paragraph of the "qualification," b-91, was "inadequate," "confusing" or "misleading." This paragraph stated that, if Petitioners did not know or, by the exercise of reasonable diligence, should not have known of the alleged violations by November 17, 1984, the statute did not bar their claims. This is the law. Ferris v. Haymore, 967 F.2d 946 (4th Cir. 1992); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959). The Fourth Circuit was entirely correct in upholding the instruction. Teague, 35 F.3d at 994 n.22.

Petitioners' contention is also irrelevant. The jury found that Bakker committed common law fraud. It found that Deloitte did not aid and abet or conspire with Bakker, not that there was an "absolute bar" of the claims against Deloitte. See a-5 (Issues 18 and 19). Similarly, the jury found that the Partnerships were not timeshares, that Bakker did not violate the SC Timeshare Act, and that Deloitte did not aid and act or conspire with Bakker to commit any violation. See a-5 to a-6 (Issues 20-23). Therefore, any alleged defect in the limitations instructions was harmless. O.K. Sand & Gravel v. Martin Marietta Technologies, 36 F.3d 565, 569-71 (7th Cir. 1994); Elwood v. Pina, 815 F.2d 173, 177-79 (1st Cir. 1987).

CONCLUSION

For all the foregoing reasons, the Petition does not present any issue warranting review by this Court. Therefore, the Petition should be denied.

Respectfully submitted, this the 26th day of January, 1995.

James T. Williams, Jr.*
Robert A. Singer
Jim W. Phillips, Jr.
Brooks, Pierce, McLendon,
Humphrey & Leonard, L.L.P.
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Greensboro, North Carolina 27401
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(202) 659-9505
Attorney for Defendant-Respondent
David A. Taggart

*Counsel of Record

APPENDIX

APPENDICES

a. Cited Portions of the Joint Appendix Filed in the Fourth Circuit

b. Cited Portions of the Trial Transcript

c. Letter of Petitioners' Counsel, dated November 30, 1990

d. Petitioners' Proposed Jury Issues, dated December 3, 1990

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-87-514-M
[STYLE OMITTED]

PROCEDURAL HISTORY

From October, 24, 1990 through December 10, 1990, this case was tried to a jury.

On December 14, 1990, the jury returned its verdict.

On January 4, 1991, the court entered judgment on that verdict.

On January 9, 1991, defendant Bakker filed a "motion for judgment notwithstanding the verdict and new trial."

On January 14, 1991, plaintiffs filed a "motion for a new trial or to alter or amend the judgment."

* * *

* * *

PLAINTIFFS' MOTION FOR A NEW TRIAL OR TO ALTER OR AMEND THE JUDGMENT

Because the court finds that the jury's verdict was reasonable, and was neither against the clear weight of the evidence nor a miscarriage of justice, plaintiffs' motion for a new trial is hereby DENIED.

Plaintiffs seek to alter or amend the judgment to strike certain of the jury's answers to the issues submitted as part of the Jury Form (docket #780).

The court finds the jury's responses on the Jury Form to be completely consistent. The mere fact that the jury responded to some questions that need not have been answered does not, absent any inconsistency, demonstrate any prejudicial confusion on the party [sic] of the jury.

Plaintiffs' motion to alter or amend the judgment is therefore DENIED.

* * *

However, as to plaintiffs' case against defendant Cortese, the circumstances of the case do not suffice to overcome the rule 54(d) presumption. Like the plaintiffs, defendant Cortese is a person of modest means. Like the plaintiffs, defendant Cortese (who is herself a "lifetime partner") is a victim of fraud. Finally, plaintiffs' case against defendant Cortese, unlike that against the other defendants, was virtually non-existent. In fact, although the court declined to grant defendant Cortese's motion for directed verdict, it indicated (to counsel) that if the jury were somehow to find her liable, the court would enter a judgment for defendant Cortese notwithstanding the jury verdict. As to Cortese, this case was neither close nor difficult.

* * *

SUMMARY

IT IS HEREBY ORDERED:

1) That defendant Bakker's "motion for judgment notwithstanding the verdict and new trial" is DENIED;

2) That plaintiffs' "motion for a new trial or to alter or amend the judgment" is DENIED;

3) That ruling on plaintiffs' "motion to lift this court's stay against prosecution of Laventhol & Horwath and Spears" [sic] is DEFERRED pending further order of the Bankruptcy Court;

4) That the costs incurred by plaintiffs in prosecuting this action against defendant Bakker shall be taxed against defendant Bakker;

5) That the costs incurred by defendant Cortese shall be taxed against the plaintiffs'

6) That each party shall pay its own costs with respect to the plaintiffs' actions against Deloitte Haskins & Sells and Taggart; and

7) That plaintiffs' "motion to distribute RHNB settlement fund" is GRANTED.

This 14 day of May, 1991.

/s/ James B. McMillan

James B. McMillan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Civil action No. cc-87-514-M
[STYLE OMITTED]

INSTRUCTION: ANSWER EITHER "YES", PLAINTIFFS HAVE PROVEN THAT THE DEFENDANT VIOLATED THE LAW ALLEGED, OR "NO", PLAINTIFFS HAVE NOT PROVEN THAT THE DEFENDANT VIOLATED THE LAW ALLEGED.

Racketeering Influenced Corrupt Organization Act (RICO)

1. Did Bakker commit a primary violation of Section 1962(a) of RICO? No
   INSTRUCTION: If your answer to Question 1 is "Yes", answer Question 2. If your answer to Question 1 is "No", proceed to Question 4.
2. Did Taggart knowingly and substantially aid and abet Bakker's primary violation of Section 1962(a) of RICO? No
   INSTRUCTION: Proceed to next question.
3. Did Deloitte knowingly and substantially aid and abet Bakker's primary violation of Section 1962(a) of RICO? No
   INSTRUCTION: Proceed to next question.
4. Did Bakker commit a primary violation of Section 1962(b) of RICO? No
   INSTRUCTION: If your answer to Question 4 is "Yes", answer Question 5. If your answer to Question 4 is "No", proceed to Question 7.
5. Did Taggart knowingly and substantially aid and abet Bakker's primary violation of Section 1962(b) of RICO? No
   INSTRUCTION: Proceed to next question.
6. Did Deloitte knowingly and substantially aid and abet Bakker's primary violation of

Section 1962(b) of RICO? No

INSTRUCTION: Proceed to next question.

7. Did Bakker commit a primary violation of Section 1962(c) of RICO? No

INSTRUCTION: If your answer to Question 7 is "Yes", answer Question 8. If your answer to Question 7 is "No", proceed to Question 10.

8. Did Taggart knowingly and substantially aid and abet Bakker's primary violation of Section 1962(c) of RICO? No

INSTRUCTION: Proceed to next question.

9. Did Deloitte knowingly and substantially aid and abet Bakker's primary violation of Section 1962(c) of RICO? No

INSTRUCTION: Proceed to next question.

10. Did Taggart knowingly and wilfully conspire with Bakker to violate Sections 1962(a), (b), (c) or (d) of the RICO statutes? No

INSTRUCTION: Proceed to next question.

11. Did Deloitte knowingly and wilfully conspire with Bakker to violate Sections 1962(a), (b), (c) or (d) of the RICO statute? No

INSTRUCTION: Proceed to next question.

NC Racketeering Influenced and Corrupt Organizations Act (NC RICO)

12. Did Bakker commit a primary violation of the NC RICO Act? No

INSTRUCTION: If your answer to Question 12 is "Yes", answer Question 13. If your answer to Question 12 is "No", proceed to Question 17.

13. Did Taggart knowingly and substantially aid and abet Bakker's primary violation of the NC RICO Act? No

INSTRUCTION: Proceed to next question.

14. Did Deloitte knowingly and substantially aid and abet Bakker's primary violation of the NC RICO Act? No

INSTRUCTION: Proceed to next question.

15. Did Taggart knowingly and wilfully conspire with Bakker to violate the NC RICO Act? No

INSTRUCTION: Proceed to next question.

16. Did Deloitte knowingly and wilfully conspire with Bakker to violate the NC RICO Act? No

INSTRUCTION: Proceed to next question.

Common Law Fraud

17. Did Bakker commit a common law fraud? Yes

INSTRUCTIONS: If your answer to Question 17 is "Yes", answer Question 18. If your answer to Question 17 is "No", proceed to Question 20.

18. Did Deloitte knowingly and substantially aid and abet Bakker's common law fraud? No

INSTRUCTION: Proceed to next question.

19. Did Deloitte knowingly and willfully conspire with Bakker to commit a common law fraud? No

INSTRUCTION: Proceed to next question.

Time Share Act

20. Were the Lifetime Partnerships Timeshares? No

INSTRUCTION: If your answer to Question 20 is "Yes", answer Question 21. If your answer to Question 20 is "No", proceed to Question 24.

21. Did Bakker commit a violation of the S.C. Time Share Act? No

INSTRUCTION: If your answer to Question 21 is "Yes", answer Question 22. If your answer to Question 21 is "No", proceed to Question 24.

22. Did Deloitte knowingly and substantially aid and abet Bakker's violation of the Time Share Act? No

INSTRUCTION: Proceed to next question.

23. Did Deloitte knowingly and willfully conspire with Bakker to violate the Time Share Act? No

INSTRUCTION: Proceed to next question.

Damages -- Proximate Cause

INSTRUCTION: Answer Questions 24-29 only as to each defendant you have found to have violated one or more of the laws above.

24. Did Bakker proximately cause injury to Plaintiffs? Yes

25. Did Taggart proximately cause injury to Plaintiffs? No

26. Did Deloitte proximately cause injury to Plaintiffs? No

Damages

INSTRUCTION: Write the amount of damages if any, proximately caused by each of the following Defendants. Write a number "zero" or greater.

27. The amount of damages, if any, proximately caused by Bakker is $129,618,000.00

28. The amount of damages, if any, proximately caused by Taggart is $ - 0 -

29. The amount of damages, if any, proximately caused by Deloitte is $ - 0 -

Punitive Damages

INSTRUCTION: You may answer this question 30 as to Bakker only if you Answered yes to question 17. You may answer this Question 30 as to Deloitte only if you answered yes to Question 18.

30. Did Bakker engage in conduct so outrageous or malicious as to warrant imposition of punitive damages? Yes

Did Deloitte engage in conduct so outrageous or malicious as to warrant imposition of punitive damages? No

INSTRUCTION: If you answered "yes" to Question 30 as to a Defendant, you may answer Question 31 as to that Defendant.

31. In your discretion what amount of punitive damages, if any, should Plaintiffs recover from Bakker? $129,618.00

In your discretion what amount of punitive damages, if any, should Plaintiffs recover from Deloitte? $ - 0 -

Negligence -- Cortese

32. Was Defendant Cortese grossly negligent? No

INSTRUCTION: If you answer Question 32 "yes", go to Question 33. If you answer Question 32 "no", then proceed to Question 34.

33. Was the gross negligence of Defendant Cortese the proximate cause of Plaintiffs' damages? No

INSTRUCTION: If you answer Question 33 "yes", go to Question 34. If you answer Question 33 "no", then proceed to Question 35.

34. What amount, if any, are Plaintiffs entitled to recover from Defendant Cortese? $ - 0 -

INSTRUCTION: Proceed to Question 35.

Negligence -- Taggart

35. Was Defendant Taggart grossly negligent? No

INSTRUCTION: If you answer Question 35 "yes", go to Question 36. If you answer Question 34 "no", then do not answer Questions 36 and 37.

36. Was the gross negligence of Defendant Taggart the proximate cause of Plaintiffs' damages? No

INSTRUCTION: If you answer Question 36 "yes", go to Question 37. If you answer Question 36 "no", then do not answer Question 37.

37. What amount, if any, are Plaintiffs entitled to recover from Defendant Taggart? $ - 0 -

(Please note that any damages awarded under this claim cannot be added to any damages awarded in response to Question 28 above.)

YOUR DELIBERATIONS ARE AT AN END

DELOITTE HASKINS & SELLS

* * *

AUDITORS' REPORT

Heritage Village Church and
Missionary Fellowship, Inc.:

We have examined the combined balance sheets of Heritage Village Church and Missionary Fellowship, Inc., PTL Club Television Network of Canada, Fort Heritage Campgrounds and Christian Retreat, Inc., PTL Enterprises, Inc., Heritage School of Evangelism and Communication and Heritage Christian Day School (hereinafter referred to on a combined basis as the "Ministry") as of May 31, 1984 and 1983 and the related combined statements of revenues, expenses and accumulated excess of revenues over expenses and of changes in financial position for the fiscal years then ended. Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the above-mentioned combined financial statements present fairly the financial position of the Ministry at May 31, 1984 and 1983 and the results of its operations and the changes in its financial position for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis.

Our examinations were made for the purpose of forming an opinion on the basic financial statements taken as a whole. The supplemental combining schedules as of May 31, 1984 and for the fiscal year then ended are presented for the purpose of showing the composition of the combined balance sheet, statement of revenue, expenses and accumulated excess of revenues over expenses, and statement of changes in financial position and are not a required part of the basic financial statements. Such schedules have been subjected to the auditing procedures applied in the examination of the basic financial statements, and, in our opinion, are fairly stated in all material

respects when considered in relation to the basic financial statements taken as a whole.

August 31, 1984 (except for Note 7 as
to which the date is October 24, 1984)

DELOITTE
HASKINS & SELLS

2100 Southern National Center
Charlotte, North Carolina 28202
(704) 272-3560
Cable DEHANDS

ACCOUNTANTS' REVIEW REPORT

Heritage Village Church and
Missionary Fellowship, Inc.:

We have reviewed the accompanying combined balance sheet of Heritage Village Church and Missionary Fellowship, Inc., PTL Club Television Network of Canada, Heritage School of Evangelism and Communication, Heritage Christian Day School, Fort Heritage Campgrounds and Christian Retreat, Inc. and PTL Enterprises, Inc. (hereinafter referred to on a combined basis as the "Ministry") as of November 30, 1983 and the related combined statements of revenues, expenses and accumulated excess of revenues over expenses, and of changes in financial position for the six month period then ended, in accordance with standards established by the American Institute of Certified Public Accountants. All information included in these financial statements is the representation of the management of the Ministry.

A review consists principally of inquiries of Ministry personnel and analytical procedures applied to financial data. It is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

Based on our review, we are not aware of any material modifications that should be made to the aforementioned financial statements in order for them to be in conformity with generally accepted accounting principles.

Heritage Grand Hotel
Charlotte, NC 28279

Linda Sample
Apt 212
5534 Test St.
Anywhere, NC 29210

December 20, 1983

Dear Linda,

How would you like to spend 4 days and 3 nights at the brand new Heritage Grand Hotel every year, for the rest of your life ... free!

Linda, I am writing you today as one of my most faithful Partners to invite you to become one of the first Lifetime Partners of the new PTL Partner Center!

The Lord has given me a vision to do what no one in the Christian world has ever done before. But before I unveil this magnificent fellowship center on the Jim Bakker program, I wanted you to be one of the first to invest in a unique lifetime partnership with the PTL ministry.

I have never made an offer like this in the history of PTL.

For a gift of $1,000 today to help us build this beautiful center at Heritage USA and continue our worldwide ministry, you will become a Lifetime Partner and will be afforded some very special privileges ...

As a Lifetime Partner, you can spend up to 4 days and 3 nights at the PTL Partner Center free, every single year, for the rest of your life! Just think, as you invest your gift of $1,000 into the ministry of PTL, we are investing back into you!

You cannot find a better investment opportunity anywhere -- you can actually save thousands of dollars during your lifetime with your one-time investment of $1,000 in the ministry of PTL.

Based on the current rate of inflation, if you used your PTL Lifetime Partner membership for 40 years, the gift value of a room at the Heritage Grand Hotel would be almost $20,000!

While you stay at the PTL Partner Center, you can shop in any of the wonderful shops, or perhaps stay in a

* * *

PTL TELEVISION NETWORK

Memo

To: Jim Bakker

From: Peter G. Bailey

Date: September 13, 1984 [marginalia omitted]

Re: DH & S Audit

CC: Richard Dortch

I met with Bob Brown of DH & S today to review the audit report for the year ended May 31, 1984. The main concern expressed in the report is whether PTL will be able to continue as "a going concern" based on current assets of only 8.6 million against 28.5 million in current liabilities. There is a concern whether PTL will have the ability to meet its debt obligations during the coming year.

I went over PTL's plan to raise funds to meet the above need as outlined below:

1.	Telethon beginning 9/17		$30,000,000
	Construction of Tower		15,500,000
			15,000,000
	Pay off accounts payable		10,000,000
			5,000,000
	Construction of Studio Auditorium		5,000,000

2.	Hall of Agreement		10,000,000
3.	Hotel Mortgage	21,000,000	21,000,000
	Complete HGH	10,000,000	
		11,000,000	
	Invest-6 hos CD	11,000,000	

	In 6 mos - pay on mortgage		11,000,000
	Balance of Mortgage		$ 10,000,000

Mr. Brown was pleased to see this and wants to discuss with myself and Richard Dortch the wording in the audit report about their concern.

7. SUBSEQUENT EVENTS

Subsequent to May 31, 1984, the Ministry announced the planned construction of Heritage Towers, an expansion of the Heritage Grand Hotel, to be funded, as was the Heritage Grand Hotel, by one-time partner contributions. Contributions for the expansion are expected to exceed the cost of construction by approximately $15,000,000. Also, as of October 24, 1984 the Ministry is negotiating for $10,00,000 in long-term bank financing and the sale of certain real and personal property for $5,000,000 in cash and other considerations. Both the sale and the bank financing are expected to be finalized in late 1984, and will be used to reduce existing liabilities.

8. RECLASSIFICATION

Certain 1983 amounts have been reclassified to conform with 1984 classifications.

SEPTEMBER 17, 1984

MR. BAKKER: $24,000,000 almost. By the end of the week it will be $24,000,000. So it's in round figures, $24,000,000, has already been paid out there for the greatest Christian Center, retreat center, conference center. Never anything like it ever been built in history, and we have come this far.

Well, what are we going to do. All of the partnerships are gone. Every single of the partnerships in the Heritage Grand are gone. We had to say, "Stop."

* * PROGRAM CONTINUES * *

There are no more lifetime memberships left in the Heritage Grand, in this main beautiful Grand. So that means in history there will never be another lifetime membership in the Heritage Grand.

Now, what do you do? Well, when in doubt -- what? -- when in doubt, build something more.

SEPTEMBER 17, 1984

MR. BAKKER: You say, "Jim, why would you build a Tower when you need money to finish the Grand?" Because if you don't expand, and you don't keep growing, you can't go forward. And we need 30,000 people in this telethon to finish the miracle.

Now, we need $9,000,000 to finish the Heritage Grand. What will happen with 30,000 more members in the lifetime membership, the beautiful Towers is only going to cost $15,000,000 to build -- look, 30,000 more lifetime members will bring in $30,000,000. See, the $9,000,000 we need -- let's just round it off, because my math is not real good. We will just round it to $10,000,000 to finish the Grand.

All right, what is that, that $25,000,000. We still have got $5,000,000 left over. Lord, what will we do with $5,000,000 left over? The $5,000,000 left over will pay every TV station in America current. And PTL will have the hotel finished. We will have the Towers paid for, and every TV station paid for, and will have a 1,000 room Partner Center all completed, paid for, and not one banker entering the picture.

We have come this far --

WARDLOW, KNOX,KNOX, FREEMAN & SCOFIELD
Attorneys at Law
Charlotte, North Carolina 28202-3821
* * *

September 12, 1984

Deloitte Haskins & Sells
2100 Southern National Center
Charlotte, North Carolina 28202 [marginalia omitted]
Gentlemen:

We received a request dated August 31, 1984 from Peter G. Bailey, Vice President of Accounting for Heritage Village Church and Missionary Fellowship, Inc. to supply you with certain information in connection with your independent audit of Heritage Village Church and Missionary Fellowship, Inc.

I have set forth below information concerning pending or threatened litigation that existed at May 31, 1984 and during the period from that date to the date of this letter.

1) F. N. Thompson Construction Company vs. Heritage Village church and Missionary Fellowship, Inc., Superior Court of Mecklenburg County, North Carolina. This matter is in the discovery phase and it is anticipated that it will proceed to trial. Plaintiff is seeking approximately $22,000.00 plus interest and costs. At this point, we are unable to determine the likelihood of success by the Plaintiff.

2) Rita Warren vs. Heritage Village Church and Missionary Fellowship, Inc., United States District Court for the Western District of North Carolina, Charlotte Division. Heritage Village Church and Missionary Fellowship, Inc. was successful in obtaining summary judgement against Plaintiff in this matter. The Plaintiff appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the decision of the District Court. The time period allowed for petitioning the United States Supreme Court for review has passed. Accordingly, Heritage Village and Missionary Fellowship, Inc. has successfully defended this claim without the payment of any amount of money.

3) Fort Mill Telephone Company vs. Heritage Village Church and Missionary Fellowship, Inc., United States Court of Appeals for the Fourth Circuit. Heritage Village Church and Missionary Fellowship, Inc. was an intervener in this matter. The parties to the litigation were Fort Mill Telephone Company and the Federal Communications Commission. Heritage Village Church and Missionary Fellowship, Inc. obtained a favorable ruling from the Federal Communications Commission and Fort Mill Telephone Company appealed that decision to the United States Court of Appeals. The Court of Appeals upheld the decision of the FCC and the time for petition to the United States Supreme Court for review has passed. Accordingly, Heritage Village Church and Missionary Fellowship, Inc. has successfully defended this claim.

4) Catawba Indian Nation vs. The State of South Carolina, et. al., United States District Court for the District of South Carolina. The State of South Carolina obtained summary judgment against the Catawba Indian Nation. However, the Plaintiff, Catawba Indian Nation, appealed to the United States Court of Appeals for the Fourth Circuit. A three judge panel for the Court of Appeals ruled, two to one, in favor of the Catawba Indian Nation and and [sic] remanded the case for trial. A petition for rehearing was filed, granted, and a seven judge panel of the Court of Appeals ruled once again in favor of the Catawba Indian Nation, four to three. The time period allowed for petitioning review by the United States Supreme Court has not passed. The matter will either be heard by the United States Supreme Court or it will be remanded to the District Court of South Carolina for trial. We have no opinion at this time as to the likelihood of success by Plaintiff. However, it should be noted that the Plaintiff seeks to recover approximately 144,000 acres, including all of the land owned by Heritage Village Church and Missionary Fellowship, Inc. in Lancaster and York counties, South Carolina

5) T. R. Tucker Construction Company. As of May 31, 1984, T. R. Tucker Construction Company threatened litigation to recover approximately $93,000.00 plus interest and costs. This matter has since been settled with the payment by Heritage Village

Church and Missionary Fellowship, Inc. to T. R. Tucker of $40, 987.00.

6) Automated Swimpools, Inc. vs. Heritage Village Church and Missionary Fellowship, Inc. and Fort Heritage Campgrounds and Christian Retreat, Inc., United States District Court for the Western District of North Carolina, Charlotte Division. This is a breach of contract action in which the Plaintiff seeks to recover from the Defendants approximately $172,000.00 plus interest and costs. The lawsuit is still in the discovery phase and is proceeding toward a trial on the issues raised by the pleadings. We are unable at this time to form an opinion as to the likelihood of success by the Plaintiff.

7) Materialman's liens, the Court of Common Pleas for the Sixteenth Judicial Circuit of South Carolina.

Three materialman's liens have been in existence during the period May 31, 1984 to date. They were filed by Unadilla, Inc. of Unadilla, New York; Rea Construction Company of Charlotte, North Carolina; and Arco Gunite of Orange County, California. The liens filed by Unadilla, Inc. and Rea Construction Company have been withdrawn. The lien filed by Arco Gunite, Inc. is still pending before the Court of Common Pleas in York County, South Carolina, and constitute a potential lien in the amount of $121,352.70 on the land owned by Heritage Village Church and Missionary Fellowship, Inc. in York County, South Carolina.

8) National Black Media Coalition et. al. vs. The Federal Communications Commission, United States Court of Appeals for the District of Columbia Circuit. Heritage Village Church and Missionary Fellowship, Inc. is an intervenet in this case and could be affected by the outcome. The Plaintiffs in this matter are seeking to overturn the approval by the Federal Communications Commission of the transfer of the broadcast licenses for television station WJAN from PTL of Heritage Village Church and Missionary Fellowship, Inc. to David Livingstone Missionary Foundation, Inc.

9) Comfortable Mortgage, Inc. vs. Lewis Bartles and Heritage Village Church and Missionary Fellowship, Inc., the Court of Common Pleas for York County, South Carolina. In this matter, the Plaintiff seeks to foreclose on a mortgage. Heritage Village Church and Missionary Fellowship, Inc. has an interest in the mortgaged property by virtue of a land sale contract with Lewis Bartles. Heritage Village Church and Missionary Fellowship, Inc. has made substantial payments (approximately $68,000.00) toward the fulfillment of its obligations in the land-sale contract. Should the Plaintiff succeed, the interests of Heritage Village Church and Missionary Fellowship, Inc. in the property will be extinguished.

We know of no unasserted claims against Heritage Village Church and Missionary Fellowship, Inc.

Mr. Bailey's understanding in connection with unasserted claims or assessments, as found in the second paragraph of Page 2 of his letter to me, is correct.

If we can be of further assistance, do not hesitate to contact me at the above address.

Very truly yours,
/s/John B. Yorke

sb
cc: Mr. Peter G. Bailey

CAUDLE & SPEARS
Professional Association
Attorneys at Law
1800 Independence Center
Charlotte, North Carolina 28240
* * *

October 5, 1984

Deloitte, Haskins & Sells
2100 Southern National center
Charlotte, North Carolina 28202

Confidential

Re: Heritage Village Church and
Missionary Fellowship, Inc.

Gentlemen:

We have been requested to provide you with information with respect to our representation of Heritage Village Church and Missionary Fellowship, Inc. and its subsidiaries as to certain tax matters for its fiscal year ending May 31, 1984.

We understand that its wholly owned subsidiaries are Fort Heritage Campground and Christian Retreat, Inc., Heritage School of Evangelism and Communication, PTL Enterprises, Inc., Park Road Publishing, Inc., Praise the Lord Publishing Company, Proverbs Publishing Company, Park Road Productions, Inc., People that Love Home, Inc., and PTL of Canada.

We have served as tax counsel for specific matters upon request, including an ongoing audit by the Internal Revenue Service concerning the tax-exempt status of Heritage Village Church and Missionary Fellowship, Inc., under §501(c)(3) of the Internal Revenue Code. The Regional Commissioner of the Internal Revenue Service for the Southeast Region last year approved a complete examination of the books and records of Heritage Village Church and Missionary Fellowship, Inc., pursuant to §301.7605-1(c)(2) of the Procedure and Administration Regulations. The Internal revenue Service for the past several months has been conducting this audit, presumably to determine, among other things, if Heritage Village Church and Missionary

Fellowship, Inc., is operated exclusively as a church and charitable tax-exempt organization pursuant to §501(c)(3) of the Internal Revenue Code. To date any issue which may develop has not been specified, and it is not yet indicated when the audit may be completed. You have participated in many of the discussions concerning the audit, so we assume you are aware of its many ramifications.

We understand that Heritage School of Evangelism and Communications did not file a completed Application for Exemption with the Internal Revenue Service, and we have not expressed an opinion as to its tax-exempt status.

We are filing an Application with Internal Revenue Service seeking a determination that the subsidiary, People That Love Home, Inc., is entitled to tax-exempt status under the Code, but it may be several months before a ruling is received. We expect a favorable ruling eventually.

We have filed Applications for Determination that the terminations of previously qualified pension plans covering eligible employees of Heritage Village Church and Missionary Fellowship, Inc. and Fort Heritage Campground and Christian Retreat, Inc. will not adversely affect the corporations. A favorable letter has been received on Heritage Village and we have received verbal indication that a favorable letter will be forthcoming for Fort Heritage.

We are not otherwise aware of any litigation, claims or assessments (pending or threatened), or the basis for any with respect to matters for which we have been engaged. We understand all matters other than those tax related assigned to us have been handled or supervised by the firm's general counsel; and we therefore disclaim any knowledge of such matters.

We submitted an invoice dated January 11, 1984 for service rendered and costs advanced of which $2,902.35 was unpaid at May 31, 1984. Then under date of May 17, 1984 we submitted an invoice for $7,817.32 for services and costs advanced during the subsequent billing period, which also was unpaid, a total

of $10,719.67 unpaid at May 31, 1984. Since then payments have been received totaling $2,902.35, for a net balance of $7,817.32. Since May 31 we have submitted additional statements of $10,038.11 on August 1, 1984 and $10,043.89 on October 3, 1984.

We believe the information set forth herein remained correct both at May 31, 1984, and at the date of this letter. We disclaim any undertaking to advise you of subsequent events which hereafter may be brought to our attention as special counsel.

If you need any other information, please let us know.

Sincerely yours,
CAUDLE & SPEARS, P.A.
By: /s/ Lloyd C. Caudle

LCC:lp
cc: Mr. Peter G. Bailey
John B. Yorke, Esq.

* * *

Internal Revenue Service Examination - During the year ended May 31, 1984, the Internal Revenue Service (I.R.S.) began an examination of the Ministry's records for the fiscal years ended May 31, 1980, 1981 and 1982. No report with respect to the examination has been received; further, the Ministry has not been advised of any assertion of tax liability or of any other matters concerning its tax status. Adjustments, if any, which might be required as a result of the examination are not presently determinable.

* * *

PLAINTIFF'S JURY INSTRUCTION NO. 53 DATED: OCTOBER 5, 1990

C. FEDERAL SECURITIES JURY ISSUES

3. RULE 10b-5 TEST (SEE DEVITT §10.09)

VIOLATION BY LIFETIME PARTNERSHIPS

The plaintiff Lifetime Partner class claims that Rule 10b-5 was violated by ~~each defendant~~ Bakker ~~and Taggart~~, aided and abetted by Deloitte Haskins & Sells~~, Laventhol & Horwath, and William T. Spears, except defendant Cortese~~.

First, the plaintiff Lifetime Partner class alleges that ~~defendants~~ Bakker ~~and Taggart~~ used the mails for over two and a half million Lifetime Partnership brochures, and used television to advertise Lifetime Partnerships to more people.

Second, the Lifetime Partner class claims that ~~defendants~~ Bakker ~~and Taggart~~ made the following material omissions, and alternatively the following material misrepresentations, which violated Rule 10b-5(B), and/or that the way the Lifetime Partnership program and executive payroll account were run amounted to devices, schemes, or artifices to defraud under Rule 10b-5(A), and to fraud on Lifetime Partners under rule 10b-5(C).

Plaintiffs claim that defendants Bakker and Taggart omitted these material facts: they omitted that Lifetime Partnerships were not really ~~more valuable than the price paid~~, omitted that the Partnerships were oversold, omitted that Lifetime Partners would not have "three free nights per year for life" in PTL hotels, omitted that PTL was insolvent, omitted that defendants Bakker and Taggart were receiving private inurement, omitted that PTL's tax exemption was being threatened, and omitted that timeshare and securities laws were violated by the Lifetime Partnership program. The Lifetime Partner class alternatively alleges that Bakker ~~and Taggart~~ misrepresented these material facts: promising that Lifetime Partnerships were ~~much more valuable than the price paid~~, promising that the Partnerships would not be sold beyond stated limits, promising that Lifetime Partners would have "three free nights per year for life" in PTL hotels, promising that PTL was able to fulfill its promises and

solvent, promising that PTL compensation was proper and was audited by big independent accounting firms, promising that PTL was tax exemption, and that promising that the Lifetime Partnership program was legal.

Third, plaintiffs claim that Bakker and Taggart acted knowingly.

Fourth, the Lifetime Partner class claims that it justifiably on Bakker's omissions and misrepresentations.

Fifth, the Lifetime Partner class claims that it suffered damages as a result of Bakker's and Taggart's conduct.

Furthermore, the Lifetime Partner class also alleges that the auditors Deloitte Haskins & Sells the Laventhol & Horwath and William J. Spears aided and abetted these material omissions, misrepresentations, and frauds, as described a little later.

Each defendant denies the foregoing allegations.

APPROVED:_____

PLAINTIFFS JURY INSTRUCTION NO. 63
DATED: OCTOBER 5, 1990
C. FEDERAL SECURITIES JURY ISSUES

5. AIDING AND ABETTING

AIDING AND ABETTING -- BY DELOITTE ~~AND LAVENTHOL~~

The plaintiff Lifetime Partner class claims that a violation of Rule 10b-5 was aided and abetted by defendant~~s~~ Deloitte Haskins & Sells~~, Laventhol & Horwath, and William J. Spears~~.

First, the plaintiff Lifetime Partner class claims that defendants Bakker ~~and Taggart~~ violated Rule 10b-5 by sales of Lifetime Partnerships with material omissions, alternatively material misrepresentations, and other fraud, as alleged earlier.

Second, plaintiffs claim that Deloitte Haskins & Sells ~~and Laventhol & Horwath and William J. Spears~~ knew of those omissions and misrepresentations.

Third, the plaintiff Lifetime Partner class also claims that Deloitte Haskins & Sells ~~and Laventhol & Horwath and William J. Spears~~ substantially assisted or conspired in those omissions or misrepresentations by their role in the executive payroll account, by their opinion that PTL's financial statements fairly presented PTL's financial position and complied with generally accepted accounting principles, by their omissions or misrepresentations in their auditors' reports, and by their not disclosing the following: the oversales of Lifetime Partnerships, the insolvency of PTL, the private inurement of PTL funds to defendant~~s~~ Bakker ~~and Taggart~~, the threatened loss of PTL's tax exemption, the timeshare law violations by the Lifetime Partnership program, and the securities law violations.

~~Each defendant denies the~~ foregoing allegations.

APPROVED:___

PLAINTIFFS JURY INSTRUCTION NO. 64
DATED: OCTOBER 5, 1990
C. FEDERAL SECURITIES SOURCE: ADMIRALTY FUND V. HUGH JOHNSON & CO.

5. AIDING AND ABETTING

"AIDING AND ABETTING" -- BY AUDITORS

"An accountant may be liable as an aider and abettor if it knows, or is reckless in not knowing, that its client has committed a primary violation, and it substantially aids the client in the overall enterprise. [omitted footnote]

PLAINTIFFS JURY INSTRUCTION NO. 69
DATED: OCTOBER 5, 1990
D. NORTH CAROLINA SECURITIES JURY ISSUES

1. GENERAL

STATE SECURITIES -- PLAINTIFFS' CLAIMS

The plaintiff Lifetime Partner class alleges that defendants Bakker and/or Taggart violated North Carolina securities law in connection with the sale of Lifetime Partnerships, and that defendants Deloitte Haskins & Sells and Laventhol & Horwath and William J. Spears aided and abetted and conspired in those violations, for the same reasons that they violated federal securities law.

The defendants disagree that Lifetime Partnerships are securities, or that Bakker and Taggart violated securities laws, or that the auditors aided and abetted or conspired in those violations.

PLAINTIFFS JURY INSTRUCTION NO. 69
DATED: OCTOBER 5, 1990
D. STATE SECURITIES JURY ISSUES

3. PLAINTIFFS' CLAIMS

STATE SECURITIES -- PLAINTIFFS' CLAIMS

The plaintiff Lifetime Partner class alleges that defendant~~s~~ Bakker ~~and/or Taggart~~ violated North Carolina securities law and South Carolina securities law in connection with the sale of Lifetime Partnerships, and that defendant~~s~~ Deloitte Haskins & Sells ~~and Laventhol & Horwath and William J. Spears~~ aided and abetted ~~and conspired~~ in those violations, for the same reasons that they violated federal securities law.

The defendants disagree that Lifetime Partnerships are securities, or that Bakker and Taggart violated securities laws, or that the auditors aided and abetted ~~or conspired in~~ those violations.

APPROVED:_____

PLAINTIFFS' JURY INSTRUCTIONS NO. 53
DATED: NOVEMBER 26, 1990 (REVISED)
C. FEDERAL SECURITIES 3 RULE 10b-5 TEST — PARTIES' CONTENTIONS (SEE DEVITT § 10.09)

VIOLATION BY LIFETIME PARTNERSHIPS

The plaintiff Lifetime Partner class claims that Rule 10b-5 was violated by defendant Bakker, aided and abetted by Deloitte Haskins & Sells.

First, the plaintiff Lifetime Partner class alleges that defendant Bakker used the mails for over two and a half million Lifetime Partnership brochures, and used television to advertise Lifetime Partnerships to more people.

Plaintiffs claim that defendant Bakker omitted these material facts: he omitted that Lifetime Partnership were not really worth "almost $20,000" or more, omitted that the Partnerships were oversold, omitted that Lifetime Partners would not have "three free nights per year for life" in PTL hotels, omitted that PTL was insolvent or had serious going concern problems, omitted that defendants Bakker and Taggart were receiving private inurement, omitted that PTL's tax exemption was being threatened, and omitted that timeshare and securities laws were violated by the Lifetime Partnership program. The Lifetime Partner class alternatively alleges that Bakker misrepresented these material facts: promising that Lifetime Partnerships were worth "almost $20,000" or more, promising that the Partnerships would not be sold beyond stated limits, promising that Lifetime Partners would have "three free nights per year for life" in PTL hotels, promising that PTL was able to fulfill its promises and solvent and a going concern, promising that PTL compensation was proper and was audited by big independent accounting firms, promising that PTL was and would remain tax exempt, and promising that the Lifetime Partnership program was legal.

Third, plaintiffs claim that Bakker acted knowingly.

Fourth, the Lifetime Partner class claims that it justifiably relied on Bakker's omissions and misrepresentations.

Fifth, the Lifetime Partner class claims that it suffered damages as a result of Bakker's conduct.

Furthermore, the Lifetime Partner class also alleges that the auditor Deloitte Haskins & Sells aided and abetted these material omissions, misrepresentations, and frauds, as described a little later.

Bakker and Deloitte Haskins & Sells deny the foregoing allegations.

APPROVED:_____

PLAINTIFFS' JURY INSTRUCTIONS NO. 63
DATED: NOVEMBER 26, 1990 (REVISED)
C. FEDERAL SECURITIES PARTIES' CONTENTIONS
5. AIDING AND ABETTING

AIDING AND ABETTING--BY DELOITTE

The plaintiff Lifetime Partners class claims that a violation of Rule 10b-5 was aided and abetted by defendant Deloitte Haskins & Sells.

First, the plaintiff Lifetime Partner class claims that defendant Bakker violated Rule 10b-5 by sales of Lifetime Partnerships with material omissions, alternatively material misrepresentations, and other fraud, as alleged earlier.

Second, plaintiffs claim that Deloitte Haskins & Sells knew of those omissions and misrepresentations.

Third, the plaintiff Lifetime Partner class also claims that Deloitte Haskins & Sells substantially assisted or conspired in those omissions or misrepresentations by their role in the executive payroll account, by their opinion that PTL's financial statements fairly presented PTL's financial position and complied with generally accepted accounting principles, by their omissions or misrepresentations in their auditors' reports, and by their not disclosing the following: the oversales of Lifetime Partnerships, the insolvency and serious going concern problem of PTL, the private inurement of PTL funds to defendant Bakker, the threatened loss of PTL's tax exemption, the timeshare law violations by the Lifetime Partnership program, and the securities law violations.

Bakker and Deloitte Haskins & Sells denies the foregoing allegations.

APPROVED:_____

PLAINTIFFS' JURY INSTRUCTIONS NO. 69
DATED: NOVEMBER 26, 1990 (REVISED)
C. FEDERAL SECURITIES PARTIES' CONTENTIONS
3. PLAINTIFFS' CLAIMS

STATE SECURITIES--PARTIES' CLAIMS

The plaintiff Lifetime Partner class alleges that defendant Bakker violated North Carolina securities law and South Carolina securities law in connection with the sale of Lifetime Partnerships, and that defendant Deloitte Haskins & Sells aided and abetted those violations, for the same reasons that they violated federal securities laws.

The defendants disagree that Lifetime Partnerships ares securities, or that Bakker violated securities laws, or that Deloitte Haskins & Sells aided and abetted those violations.

PLAINTIFFS' JURY INSTRUCTION NO. 32
DATED: DECEMBER 3, 1990 (FINAL)
C. FEDERAL SECURITIES
SOURCE: WOODS V. BARNETT BANK

6. AIDING AND ABETTING

"AIDING AND ABETTING"--GENERAL TEST

[Plaintiffs claim that defendant Bakker violated Rule 10b-5. Plaintiffs also claim that defendant Deloitte Haskins & Sells aided and abetted in that violation. I will now instruct you on the elements of an aiding and abetting claim.]

"[T]he elements necessary for establishing liability for damages as an aider and abettor of a violation of Rule 10b-5 [are]:

[A] person may be held as an aider and abettor only

[1] if some other party has committed a securities law violation [of Rule 10b-5],

[2] if the accused party has general awareness that his role was part of an overall activity that is improper, and

[3] if the accused aider-abettor knowingly and substantially assisted the violation. [footnote omitted]

SOURCE: ADMIRALTY FUND V. JOHNSON & CO.

"AIDING AND ABETTING"--BY AUDITORS

"An accountant may be liable as an aider and abettor if it knows, or is reckless in not knowing, that its client has committed a primary violation, and it substantially aids the client in the overall enterprise." [footnote omitted]

APPROVED:_____

PLAINTIFFS' JURY INSTRUCTION NO. 32
DATED: DECEMBER 3, 1990 (FINAL)
C. FEDERAL SECURITIES
SOURCE: WOODS V. BARNETT BANK

6. AIDING AND ABETTING

"AIDING AND ABETTING--GENERAL TEST

[Plaintiffs claim that defendant Bakker violated Rule 10b-5. Plaintiffs also claim that defendant Deloitte Haskins & Sells aided and abetted in that violation. I will now instruct you on the elements of an aiding and abetting claim.]

"[T]he elements necessary for establishing liability for damages as an aider and abettor of a violation of Rule 10b-5 [are]:

[A] person may be held as an aider and abettor only

[1] if some other party has committed a securities law violation [of Rule 10b-5],

[2] if the accused party has general awareness that his role was part of an overall activity that is improper, and

[3] if the accused aider-abettor knowingly and substantially assisted the violation. [footnote omitted]

SOURCE: ADMIRALTY FUND V. JOHNSON & CO.

"AIDING AND ABETTING"--BY AUDITORS

"An accountant may be liable as an aider and abettor if it knows, or is reckless in not knowing, that its client has committed a primary violation, and it substantially aids the client in the overall enterprise. [footnote omitted]

APPROVED:_____

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
NO. CC-87-514-M
[Filed December 3, 1990]
[Style Omitted]

PLAINTIFFS' STIPULATION OF ISSUES
NOT TO BE SUBMITTED TO THE JURY IN THIS TRIAL

Plaintiffs hereby stipulate that the following issues shall not be submitted to the jury at the conclusion of this trial, and are not submitting jury instructions on these issues:

1. RICO claims in Restated Amended Company §§ 241-276.
2. North Carolina RICO claims in Restated Amended Complaint §§ 296-297, 300-313.
3. North Carolina timeshare claims in Restated Amended Complaint §§ 320-326, 300-313.
4. Federal securities § 12(2) claims in Restated Amended Complaint §§ 371-375C.
5. Federal securities registration claims in Restated Amended Complaint §§ 409-414.
6. North Carolina securities registration claims in Restated Amended Complaint §§ 415-19.
7. South Carolina securities registration claims in Restated Amended Complaint §§ 420-25.
8. North Carolina interference with property rights claims in Restated Amended Complaint §§428-29.
9. South Carolina fraudulent charitable solicitations and swindling claims in Restated Amended Complaint §§ 434-440.
10. Claims against Laventhol & Horworth, Speaks, Messner, Messner Enterprises, and Commercial Builders in Restated Amended Complaint.
11. Donor fraud claims in Restated Amended Complaint §§ 61-104.

12. Secured Creditor (Messner, Commercial Builders, Messner Enterprises) claims in Restated Amended Complaint §§ 132-1534.

Plaintiffs do not hereby enter any stipulation in regard to a new trial, if the jury should be unable to reach a verdict or if a verdict should be reversed on appeal; or in regard to Laventhol & Horwath and Spears; and do not waive the foregoing issues in those events.

Dated November 30, 1990.

/s/Jonathan Wallas
[address omitted]
Thomas T. Anderson
[address omitted]
Wendell R. Bird
[address omitted]

Attorney for Plaintiffs

APPROVED BY THE COURT:

_____

James B. McMillan
United States District Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading, and the accompanying exhibits, has been served upon counsel for all parties at interest in this case by telecopying a true and exact copy of said pleading to said counsel at.

This 30th day of November, 1990.

Thomas T. Anderson & Associates
By: _____

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
[Style Omitted]
CIVIL ACTION
NO. CC-87-514-M

PLAINTIFFS' SUBSTITUTE JURY INSTRUCTIONS ON FEDERAL SECURITIES AIDING AND ABETTING

[Filed December 5, 1990]

1. FEDERAL SECURITIES--AIDING AND ABETTING INSTRUCTION

While plaintiffs feel their instruction 32 is appropriate, we are willing to modify it to meet Deloitte's objection by the attached revision. However, the cases cited by Deloitte do not generally give its 4-point test for aiding and abetting, but instead the traditional 3-point test. And the cases do not require the ultra-consciousness that Deloitte requires, but instead allow liability for recklessness [footnote omitted] or silence or inaction [footnote omitted][.]

2. AMENDED INSTRUCTIONS 21 AND 43

Attached are amendments of plaintiffs' instructions 21(RICO) and 43 (state fraud).

Dated December 5, 1990.

Respectfully submitted,

/s/Jonathan Wallas
[address omitted]
Thomas T. Anderson
[address omitted]
Wendell R. Bird
David J. Myers
[address omitted]

* * *

[addresses omitted]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading, and the accompanying exhibits, has been served upon counsel for all parties at interest in this case by hand delivering a true and exact copy of said pleading to said counsel in court.

This 5th day of December, 1990.

Thomas T. Anderson & Associates

By:/s/ Wendell R. Bird

BRIEFS/PTL/TMOTIONSP78/172

PLAINTIFFS' JURY INSTRUCTION NO. 21
DATED: DECEMBER 5, 1990 (REVISED)
A. FEDERAL RICO
SOURCE: DEVITT § 100.11
7. DAMAGES

DAMAGES

[If you find that defendant Bakker has violated any provision of RICO, and/or defendant Deloitte Haskins & Sells or Taggart have violated Section 1962(d) or violated RICO by aiding and abetting any violation by Bakker of RICO, then you must consider damages for the plaintiffs' class. You must consider damages separately for each defendant, if any, which has violated one or more elements of RICO.]

In considering the issue of damages, if any, with respect to the RICO claim, you are instructed that you should assess the amount you find to be justified by a preponderance of evidence as full, just and reasonable compensation for all of the damages to all the plaintiffs in their business or property, no more and no less. Damages may not be based on speculation because it is only actual damages--what the law calls compensatory damages--that you are to determine.

(You should consider the amount of damages, if any, with respect to each claim separate and independent from the amount of damages, if any, with respect to other claims. For example, and by way of example only, if you determine that damages should be awarded to plaintiffs under their RICO claim you should award full, just, and reasonable compensation for damages under the RICO claim, without regard to the damages, if any, you might award under another claim.) [footnote omitted]

SOURCE: DEVITT § 80.15

DAMAGES--LIABILITY

When the RICO violations of two or more persons contribute concurrently, and proximate causes, to the injury and damage of

another, each of such persons is liable. This is true regardless of the relative blame or fault of each. [footnote omitted]

PLAINTIFFS' JURY INSTRUCTION NO. 32
DATED: DECEMBER 5, 1990 (REVISED)
C. FEDERAL SECURITIES
SOURCE: METGE V. BAEHLER (1985)

6. AIDING AND ABETTING

"AIDING AND ABETTING"--GENERAL TEST

[Plaintiffs claim that defendant Bakker violated Rule 10b-5. Plaintiffs also claim that defendant Deloitte Haskins & Sells aided and abetted in that violation and thereby violated securities law. I will now instruct you on the elements of an aiding and abetting claim.]

"[There is] a three-pronged test to establish aiding-and-abetting liability. These requirements include:

(1) the existence of a securities law violation by the primary party (as opposed to the aiding and abetting party);

(2) 'knowledge' of the violation on the part of the aider and abettor; and

(3) 'substantial assistance' by the aider and abettor in the achievement of the primary violation.

. . . The factors--particularly the second and third--are not to be considered in isolation, but should be considered relative to one other....[footnote omitted]

SOURCE: DEVITT § 80.15

DAMAGES--LIABILITY

When the securities violations of two or more persons contribute concurrently, and as proximate causes, to the injury and damage of another, each of such persons is liable. This is true regardless of the relative blame or fault of each. [footnote omitted]

PLAINTIFFS' JURY INSTRUCTION NO. 43
DATED: DECEMBER 5, 1990 (REVISED)
F. NORTH CAROLINA FRAUD LAWS
SOURCE: GILBERT V. BAGLEY (M.D.N.C.)

2. AIDING AND ABETTING AND CONSPIRACY

AIDING AND ABETTING

"For harm resulting to a third person from the tortious conduct of another, a person is liable if he:....
knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.'

. . . "[N]onofficers and non-directors may be liable for substantially assisting or encouraging another's breach of fiduciary duty. [footnote omitted]

SOURCE: DEVITT § 100.11

DAMAGES

In considering the issue of damages, if any, with respect to the fraud claim, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the damages to all the plaintiffs in their business or property, no more and no less. Damages may not be based on speculation because it is only actual damages--what the law calls compensatory damages--that you are to determine.

(You should consider the amount of damages, if any, with respect to each claim separate and independent from the amount of damages, if any, with respect to other claims. For example, and by way of example only, if you determine that damages should be awarded the plaintiffs under their fraud claim you should award full, just, and reasonable compensation for damages under the fraud claim, without regard to the damages, if any, you might award under any other claim.) [footnote omitted]

SOURCE: DEVITT §80.15

DAMAGES--LIABILITY

When the fraud and aiding and abetting of two or more persons contribute concurrently and as proximate causes, to the injury and damage of another, each of such persons is liable. This is true regardless of the relative blame or fault of each.

APPROVED:_____

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-87-514-M

[Style Omitted] Consent Order

IT IS ORDERED:

1. Causes of Action 3-14 are dismissed with prejudice against defendant Taggart only.

2. The Court, in its discretion, exercised pendent jurisdiction with respect to Cause of Action 15 of the Restated Amended Complaint (the gross negligence count) against defendant Taggart, which had gone to the jury for decision. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988).

3. This Order is binding as to plaintiffs and defendants Taggart as the signatures of their counsel below so reflect but not as to other defendants.

DATED: December 14, 1990.

JAMES B. McMILLAN
UNITED STATES DISTRICT COURT JUDGE

Wendell R. Bird
PTL Litigation Group
Attorneys for Plaintiffs

Benjamin Cotten
Patricia R. Collins
Attorneys for Defendant Taggart

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-87-514-M
[Style Omitted]

STIPULATION OF PLAINTIFFS
AND DEFENDANTS BAKKER,
TAGGART AND CORTESE
AND
ORDER

The attorneys for the plaintiffs and attorneys for defendants Jim Bakker, Davis Taggart and Aimee Cortese, having researched and discussed fully the issue of whether the Law of North Carolina or South Carolina ought to be applied to the allegations of negligence against said defendants, and the plaintiffs and defendants Cortese having filed Memoranda of Law on the issue, the attorneys for the plaintiffs and attorneys for the defendants Jim Bakker, Davis A. Taggart and Aimee Cortese hereby stipulate and agree as follows:

1. That the law of North Carolina governs and controls the allegations of negligence made against defendants Bakker, Taggart and Cortese; and

2. That the law of North Carolina should be applied to determining the alleged negligent conduct, acts and/or omissions of defendants Bakker, Taggart and Cortese.

Respectfully submitted, this the 19th day of November, 1990.

/s/ Wendell R. Bird
Thomas T. Anderson
Wendell R. Bird
[address omitted]
Counsel for Plaintiffs

/s/ Jonathan Wallas
Jonathan Wallas
[address omitted]
Counsel for Plaintiffs

/s/ James H. Toms
James H. Toms
Eugene Carr
[address omitted]
Counsel for Defendant Bakker
/s/ Benjamin Cotten
Benjamin Cotten
Patricia Collins
[address omitted]
Counsel for Defendant Taggart
/s/ Michael E. Quiat
Michael E. Quiat
Angela S. Cerini
Nelson M. Casstevens, Jr.
[address omitted]
Counsel for Defendant Cortese

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-87-514-M
[Filed December 12, 1990]
[Style Omitted]

MEMORANDUM TO COURT FILE

On July 13, 1990, the court entered its final pretrial order, which provided, in pertinent part:

> "By October 8, 1990, counsel for all parties shall . . . [f]ile and serve proposed jury instructions, with supporting citations. Additional instructions may be submitted during the trial as circumstances may indicate."

On October 9, 1990, plaintiffs filed their proposed jury instructions.

On October 9, 1990, defendants David Taggart and Deloitte Haskins & Sells filed their proposed jury instructions.

On October 10, 1990, plaintiffs filed "supplemental proposed jury instructions."

On October 12, 1990, Deloitte Haskins & Sells filed "substituted proposed jury instructions."

On November 26, 1990, plaintiffs filed "revised proposed jury instructions."

PLAINTIFFS' JURY INSTRUCTIONS NO. 7
DATED: DECEMBER 3, 1990 (FINAL)
A. FEDERAL RICO SOURCE: DEVITT § 100.06

3. MAIL FRAUD AND WIRE FRAUD

UNDERLYING "PREDICATE" OFFENSES -- MAIL FRAUD

[*In order to prove a violation of RICO, the plaintiffs must show that a defendant, allegedly Bakker, violated the mail fraud statute and/or the wire fraud statute.*]

The mail fraud statute, Section 1341 of Title 18 U.S.C.A., provides in pertinent part:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter to thing whatever to be sent or delivered by the Postal Service, [shall be liable of an offense against the laws of the United States.]"

In order to establish that mail fraud has been committed for purposes of this case, plaintiffs must show by a preponderance of the evidence that:

First, some person or persons willfully and knowingly devised a scheme or artifice to defraud, or for obtaining money or property by means of false pretenses, representations or promises, and

Second, some person or persons used the United States Postal Service by mailing, or by causing to be mailed, some matter or thing for the purpose of executing the scheme to defraud. [footnote omitted]

SOURCE:DEVITT §100.07

FRAUDULENT INTENT -- "SCHEME" AND "ARTIFICE"

In order to establish fraudulent intent on the part of a person, it must be established that such person knowingly and intentionally

attempted to deceive another. One who knowingly intentionally deceives another is chargeable with fraudulent intent notwithstanding the manner and form in which the deception was attempted.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

The words "scheme" and "artifice" in the mail fraud statute include any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived. [footnote omitted]

APPROVED:_____

PLAINTIFFS' JURY INSTRUCTION NO. 19
DATED: DECEMBER 3, 1990 (FINAL)
A. FEDERAL RICO SOURCE: 18 U.S.C. § 2(a)

5. AIDING AND ABETTING

AID AND ABET -- "PRINCIPALS"

[*Plaintiffs also claim that defendants Deloitte Haskins & Sells and David Taggart are liable as aiders and abettors to RICO violations allegedly committed by Jim Bakker. I will now instruct you as to the requirements with respect to aiding and abetting.*]

18 United States Code Section 2 provides that an aider and abettor is punishable as a principal as follows:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. [footnote omitted]
>
> SOURCE:DEVITT § 12.03

"AID AND ABET" -- DEFINED

In order to aid and abet another to commit an offense it is necessary that the accused willfully associate himself in some way with the [RICO enterprise and pattern of racketeering acts], and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seek by some act or omission of his to make the [RICO enterprise and pattern of racketeering acts] succeed.

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

You of course may not find any defendant liable unless you find by a preponderance of the evidence that every element of the offense as defined in these instructions was committed by some person or persons, and that the particular defendant participated in its commission. [footnote omitted]

PLAINTIFFS' JURY INSTRUCTION NO. 1
DATED: DECEMBER 3, 1990 (FINAL)

A. PROPOSED FEDERAL RICO INSTRUCTIONS

A. FEDERAL RICO SOURCE: MORLEY V. COHEN (4TH CIR.)

1. INTRODUCTION

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT -- INTRODUCTION ON ELEMENTS

[*I will now instruct you as to the elements of Sections 1962(a), (b), (c), and (d) of the RICO Act. I will then define the terms used in those sections.*]

~~Defendants Jim Bakker~~, Deloitte ~~Haskins~~ & Sells, ~~and David Taggart are charged with civil violations of the federal RICO Act. "RICO" stands for the Racketeer Influenced and Corrupt Organizations Act. I will now give instructions about the requirements of Sections 1962(a), (b), (c), and (d) of the RICO Act. I will then define the terms used in those sections.~~

"To establish a civil RICO case, the plaintiff must prove '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' Racketeering activity includes the predicate acts of mail and wire fraud, the offenses at issue in the present case . . . To succeed in an action the plaintiff must prove that he was [(5)] 'injured in his business or property.' [footnote omitted]

SOURCE: H.J., INC., SEDIMA (S.CT.)

RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT -- NONCRIMINALS UNDER CIVIL RICO

White collar businesses, as well as "organized crime"-type "racketeers", are liable if they violate RICO. The RICO Act is not limited to organized crime, but extends beyond organized crime. Private civil lawsuits under the RICO statute are brought almost solely against respected and legitimate enterprises, rather than against mobsters. [footnote omitted]

SOURCE: SCHACHT (7TH CIR. 1983) ETC.

"Outsiders" as well as "insiders" can be liable for violating RICO:

> "The substantive proscriptions of the RICO statute apply to insiders and outsiders--those merely 'associated with' an enterprise-- who participate directly and indirectly in the enterprise's affairs through a pattern of racketeering activity. [Citations omitted]. Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise. [footnote omitted]

PLAINTIFFS' JURY INSTRUCTION NO. 40
DATED: DECEMBER 3, 1990 (FINAL)
E. TIMESHARE LAW
SOURCE: DEVITT § 75.01, NEWMAN V.
PRIOR (4TH CIR.), S.C.CODE

3. STATUTES OF LIMITATIONS

STATUTES OF LIMITATIONS AND EQUITABLE TOLLING

An earlier instruction defined a Statute of Limitations, and defined the Plaintiff's knowledge. Those parts of the earlier instruction apply here.

In a case like this one the time limit placed upon the Plaintiffs began to run when the Plaintiffs first knew, or by the exercise of reasonable care should have known, that the alleged fraud had occurred in connection with purchases of their Lifetime Partnerships. [footnote omitted]

In this instance the applicable limitation period is 3 years for South Carolina timeshare fraud law, and the Defendants claim that suit is barred because the Plaintiffs knew, or by the exercise of reasonable care should have known more than 3 years before the commencement of this suit on November 17, 1987, that the alleged fraud had occurred in connection with purchases of their Lifetime Partnerships. [footnote omitted]

PLAINTIFF'S SUPPLEMENTAL INSTRUCTION NO. 3
DATED: DECEMBER 10, 1990
TIMESHARE LAW--PAGES 111-112
SOURCE:DEVITT §75.01 NEWMAN V. PRIOR (4TH CIR.) S.C. CODE
N.C. COMMON LAW FRAUD--BETWEEN PAGES 119 & 120

TIMESHARE AND COMMON LAW FRAUD STATUTES OF LIMITATIONS AND EQUITABLE TOLLING

I also instructed you on the statutes of limitations for the South Carolina Time Share Act and for North Carolina common law fraud, and I want to clarify a possible misunderstanding of those instructions.

My instructions were that "the statute[s] of limitations period for the South Carolina Time Share Act [and for North Carolina common law fraud are] three years. Plaintiffs in this suit commenced their action on November 17, 1987. Thus, plaintiffs' claims respecting acts involving Lifetime Partnerships occurring on or before November 16, 1984 are barred by the statute of limitations, except as qualified in these instructions."

That instruction is correct, but the "qualification" or exception to it may not have been clear. This is the qualification or exception: if you find that fraud occurred and that it was concealed from the Lifetime Partners, "[t]he statute [of limitations] does not begin to run until the fraud is either actually known or should have been discovered by the exercise of due diligence." [footnote omitted]

In a case like this one the time limit placed upon the Plaintiffs began to run when the Plaintiffs first knew, or by the exercise of reasonable care should have known, that the alleged fraud had occurred in connection with purchases of their Lifetime Partnerships. [footnote omitted] by the exercise of reasonable care should

Thus, if the Plaintiffs ~~could~~ not have known until November 17, 1984 about the alleged fraud by Bakker then no Plaintiff is barred from suing Bakker by the statutes of limitations for the South Carolina Time Share Act and for North Carolina common law fraud.

If the Plaintiffs could not have known until November 17, 1984 about the alleged aiding and abetting and conspiracy by Deloitte Haskins & Sells then no Plaintiff is barred from suing Deloitte Haskins & Sells by the statutes of limitations for the South Carolina Time Share Act and for North Carolina common law fraud. With this certification of the "qualification" or exception, my earlier instruction remains in effect regarding the statutes of limitations for the South Carolina Time Share Act and for North Carolina common law fraud.

PLAINTIFFS' JURY INSTRUCTION NO. 34.
DATED: DECEMBER 3, 1990 (FINAL)
C. FEDERAL SECURITIES
SOURCE:DEVITT § 75.01

6. STATUTE OF LIMITATIONS
NEWMAN V. PRIOR (4TH CIR. 1975)

STATUTE OF LIMITATIONS AND EQUITABLE TOLLING

There is an issue in this case arising from a defense asserted by the defendants based upon what is called the Statute of Limitations. This is simply a provision of the law requiring that suit be commenced on certain types of claims within a prescribed period of time, otherwise suit is barred or precluded.

In a case like this one the time limit placed upon the Plaintiffs began to run when the Plaintiffs first knew, or by the exercise of reasonable care should have known, that the alleged fraud had occurred in connection with purchases of their Lifetime Partnerships. [footnote omitted]

In this instance the applicable limitation period is 2 years for North Carolina securities fraud law and 3 years for South Carolina securities fraud law, and the Defendants claim that suit is barred because the Plaintiffs knew, or by the exercise of reasonable care should have known more than 2 years and 3 years, respectively, before the commencement of this suit on November 17, 1987, that the alleged fraud had occurred in connection with purchases of their Lifetime Partnerships.

. . . .

With regard to the Plaintiff's knowledge, you are instructed that the means of knowledge are ordinarily equivalent in law to knowledge. So, if it appears from a preponderance of the evidence in the case that the Plaintiff had information which would normally have led a reasonably careful person . . . to make inquiry through which he would surely learn certain facts, then the Plaintiffs may be found to have had actual knowledge of those facts, the same as if

they had made such inquiry and had actually learned such facts. [footnote omitted]

PLAINTIFFS' JURY INSTRUCTION NO. 37
DATED: DECEMBER 3, 1990 (FINAL)
D. STATE SECURITIES
SOURCE:DEVITT § 75.01, NEWMAN V.
PRIOR (4TH CIR.), S.C. CODE

3. STATUTE OF LIMITATIONS

STATUTES OF LIMITATIONS AND EQUITABLE TOLLING

An earlier instruction defined a Statute of Limitations, and defined the Plaintiff's knowledge. Those parts of the earlier instruction apply here.

In a case like this one the time limit placed upon the Plaintiffs began to run when the Plaintiffs first knew, or by the exercise of reasonable care should have known, that the alleged fraud had occurred in connection with purchases of their Lifetime Partnerships. [footnote omitted]

In this instance the applicable limitation period is 2 years for North Carolina securities fraud and 3 years for South Carolina securities fraud law, and the Defendants claim that suit is barred because the Plaintiffs knew, or by the exercise of reasonable care should have known more than 2 years and 3 years, respectively, before the commencement of this suit on November 17, 1987, that the alleged fraud had occurred in connection with purchases of their Lifetime Partnerships. [footnote omitted]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
[STYLE OMITTED]

CIVIL ACTION
CC-87-514M
ORDER

IT IS ORDERED:

1. Causes of Action 1 through 14 are dismissed with prejudice against defendant Cortese only.

2. The Court, in its discretion, exercised pendent jurisdiction with respect to Cause of Action 15 of the restated amended complaint (the gross negligence count), against defendant Cortese, which has gone to the jury for decision. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988).

3. This order is binding as to plaintiffs and defendant Cortese, as the signatures of their counsel below so reflect, but not as to other defendants.

Dated December 13, 1990.

/s/ James B. McMillan
JAMES B. McMILLAN
United States District Judge

/s/ Wendell R. Bird
WENDELL R. BIRD
PTL Litigation Group
Attorney for Plaintiffs

/s/ Nelson S. Casstevens, Jr.
NELSON S. CASSTEVENS, JR.
MICHAEL E. QUIAT
Attorneys for Aimee Cortese

[Trial transcript p. 631 - Cross exam of Robert Bailey]

* * *

Q After Deloitte completed this audit of PTL's May 31, 1984 financial statement, did Deloitte ever perform any audit work for PTL again?

A I'm not aware of any.

Q They didn't do any interim financial reviews or look at any interim statements?

A I don't believe so.

Q And they didn't perform the audit of PTL's May 31, 1985 financial statement?

A No, they did not.

Q So, it is accurate to say, isn't it, Mr. Bailey, after Deloitte finished this audit of PTL's May 31, 1984 financial statement, after they finished performing that audit work in the summer, fall of 1984, they never audited PTL again?

A As far as I know, that's correct.

* * *

[Trial transcript p. 6971 - Direct exam of Brown]

Q And after August 31, '84, did Deloitte regularly have people out at PTL on the premises?

A No, sir.

Q Did Deloitte perform any interim work, six months review or a three-month review?

A No, sir.

Q Did Deloitte do the May 31, '85 audit?

A No, sir, we did not.

Q Who did that audit?

A Laventhol & Horwath.

Q The last audit work Deloitte did for PTL was for the fiscal year end May 31, 1984?

A That's correct.

THE COURT: Do you know when that work was completed?

THE WITNESS: The May 31st, 1984 work was completed in the field August 31st, 1984.

THE COURT: Was that for the fiscal year ending August 31st, 1984?

THE WITNESS: No, for the year ended May 31st, 1984.

* * *

[Trial transcript p. 6188 - Direct exam of Klein]

* * *

Q What is the date?

A October 22nd, 1984.

Q The typed date is here?

A August 31, 1984.

Q Do you know why the two dates?

A The date August 31st was the date of our report, with the exception of one footnote, and that date was, I believe it was October 24th, wasn't it, on the financial statements.

* * *

[Trial transcript p. 6928 - Direct exam of Brown]

* * *

Q During the end of the last fiscal year that was audited by Deloitte, PTL announced and began the Lifetime Partnership program in connection with the Heritage Grand Hotel; is that correct?

A That's correct.

Q All right. Mr. Brown, what services did Deloitte perform in connection with planning the Heritage Grand and the Lifetime Partnership program?

A Nothing.

Q Was Deloitte consulted in any way before the Heritage Grand or Lifetime Partnership program was announced?

A No, sir.

Q Did Deloitte ever provide any assistance to PTL in connection with the content of the brochure that was sent to Lifetime Partners?

A No, sir.

Q How about the layout or look of the brochure?

A Nothing with the brochure or the Lifetime Partnership program.

Q So, Deloitte never provided any assistance to PTL in connection with the formulation or planning of [6929] the program?

A No, sir.

Q Was Deloitte ever asked to express an opinion as to the program?

A No, sir.

Q So, as I understand it, in the conception and design, Deloitte had no role?

A That's correct.

[Trial transcript p. 2025 - Direct exam of Dortch]

* * *

Q What time period do you recall that from?

A The first week of January, because it was my first week officially at PTL.

Q And what year?

A 1984.

Q And what do you recall Mr. Bakker telling you about the number of Grand Lifetime Partnerships?

A We were reviewing the brochure, and as we reviewed it, because it was the first time I had seen it, the brochure specifically mentioned the fact that it was a $25,000 -- excuse me, 25,000 membership list, 50 percent of the hotel's occupancy, translated to 25,000 memberships.

* * *

[Trial transcript p. 625 - Cross of Bailey]

* * *

Q In fact, it's true, isn't it, that only about $17 million had been raised as of the end of the May 31, '84 fiscal year. Do you know that?

A Yes, about that.

* * *

[Trial transcript p. 634 - Cross exam of Bailey]

* * *

Q This is just up here in this financial statement for comparison purposes?

A That's right.

Q All right. So, out here beside deferred revenue there is a number. What is that number?

A 17,914,157.

Q All right. That is $17 million, $17,900,000. So, since all the Lifetime Partner money which had come in during the fiscal year ending May 31, 1984 was treated as deferred revenue --

A I believe so.

Q That means that the most Lifetime -- the maximum amount of Lifetime Partner money, the maximum amount of money that came from Lifetime Partners during the last year audited by Deloitte, was $17,914,157?

A Correct.

* * *

[635]

* * *

Q So, still the maximum amount that could have come in from Lifetime Partners as of May 31, 1984, is this number right here?

A That's right.

Q Seventeen million, about, 900,000 dollars?

A Yes.

Q I think you testified to this earlier, Mr. Bailey, but I want to make sure. In order to obtain, to calculate the number of Lifetime Partners at or about May 31, 1984, you could take the amount of money that had come in this column and divide by a thousand, because it was a $1,000 gift that made you a Lifetime Partner; is that right?

A That's right.

Q So, if we do that, we see that there are [636] about 17, if my math is correct, and I am never sure, there are about 17,900 Lifetime Partners as of May 31, 1984, at most?

A At most.

Q To your knowledge, during the summer of 1984, at the time Deloitte was performing this audit, it's last audit of PTL, was there any other way to determine the number of Lifetime Partners at PTL, other than to take the amount of money and divide by a thousand?

A Well, in our area, we just kept track of money. The only other area might keep track of the numbers and break down those numbers, would be in the computer area.

Q You don't know, do you, whether or not the computer department had a computer program in place to keep track of that information at that point in time?

A I just don't know.

Q So, the way you would do it if you were going to do it is take the amount of money and divide by a thousand?

A I would, yes.

* * *

[Trial transcript p 2031 - Direct exam of Dortch]

* * *

Q Do you recall roughly when that was?

A I think it was near August, September of '84, in that time frame, somehow.

Q At that time did Jim Bakker say anything about the total number of Towers Lifetime Partnerships?

A Yes.

Q At anytime after that, did you hear him tell the Lifetime Partners any change in that limit on Towers Lifetime Partnerships?

A No, sir.

Q What [w]as that limit on Towers Lifetime Partnerships that Mr. Bakker said?

A Fifty percent of the occupancy of the Towers; which translated to 30,000, and those words were used interchangeably.

Q Did Jim Bakker use the number 30,000, to your knowledge?

A Yes.

Q Now, was there a time when Grand Lifetime Partnerships ceased to be sold?

A Yes.

Q Do you recall when that time was?

A Not precisely.

Q Do you recall the year?

A In '84.

* * *

[Trial transcript p. 5822 - Direct exam of Steen]

* * *

Q The last audit that Deloitte performed for PTL was for the fiscal year ended May 31st, 1984; is that correct?

A Correct.

Q They didn't do any quarterly reviews or six months' reviews after that?

A No.

[5823]

Q The next audit or review or anything was by Laventhol for the fiscal year ending May 31, 1985?

A Correct.

Q All right. Mr. Steen, I have one more question for you. Other than those appeal reports which you have testified about and which you said you gave to Deloitte up through May 31, '84, was there any way that you know of for them to determine the amount of money that had been received by Lifetime Partners?

A To my knowledge, no.

MR. PHILLIPS: Thank you, Mr. Steen.

* * *

[Trial transcript p. 6179 - Direct exam of Klein]

* * *

Q Well, as a part of your audit procedures, did you update any of theses accounts shown on the balance sheet?

A No, we didn't update the accounts.

Q None of them?

A No.

Q And why not?

A Because again, we were auditing the period as of May 31st, 1984. We weren't auditing after that, and our report was issued after that point, but we aren't auditing after that point.

* * *

[Trial transcript p. 4556 - Cross exam of Moore]

* * *

Q Do you recall me asking at your deposition the following question:

"Question: Do you have an opinion, sir, as to whether any one at DH&S did an intentional wrong or you just think it was a mistake?" Do you recall that questions?

A. Yes.

Q And your answer was what, would you read it?

A My answer at that time, "It appears that the problem results from errors in judgment in not obtaining sufficient evidential matter to support their opinions."

Q Then I asked, "Does that mean you don't think they did an intentional wrong?"

A And I indicated that I would say that's correct.

[4557]

Q And that was after you had been all through the financial papers in time to do your final, final opinion; isn't that correct, sir?

A Yes, that's correct.

* * *

[Trial transcript p. 6131 - Direct exam of Klein]

* * *

Q Did Mr. Steen ever tell you that there were more than $25 million in Lifetime Partner contributions at any point during the audit?

A No, he didn't.

Q Did Mr. Bailey ever give you that information?

A No, he didn't either.

Q Did anybody associated with PTL ever give you that information?

A No.

Q When is the very first time that you knew there were more than 25,000 Lifetime Partners?

A When this case came up, basically.

Q During the audit, you were doing your audit work in the summer of 1984?

A Yes, that's correct.

Q During that time did you have any concern that PTL would sell more than, or solicit more than 25,000 Lifetime Partners?

A No, no concern at all.

Q During the audit, did you become aware that PTL was committing any fraud on the Lifetime Partners?

A No. We were not aware of any fraud.

[6132]

Q Did you consciously and intentionally and with a knowledge of a fraud was going on, undertake to assist PTL in committing a fraud on the Lifetime Partners?

A No, absolutely, I did not.

Q Could anybody at Deloitte -- strike that.

Was anybody at Deloitte in a better position to know about the number of dollars received from Lifetime Partners at PTL, than you were?

A No.

Q Did Mr. Leinback look at the primary documents that you looked at?

A No. Mr. Leinback reviewed my work.

Q Did Mr. Brown look at the primary documents you look at?

A No. Again he was reviewing the audit papers.

* * *

Q Now let's talk about your role in the audit. A moment ago you said you were the senior accountant on May 31, 1984 audit; correct?

A That's correct.

* * *

[Trial transcript p. 6472 - Direct exam of Leinbach]

* * *

Q Mr. Leinbach, as you concluded your audit, did you ever learn at any time that anyone at PTL was endeavoring to perpetrate a fraud on the Lifetime Partners?

A No, I did not.

Q Did you ever consciously participate and assist a fraud that you knew about on the Lifetime Partners?

A Absolutely not.

Q And as you reached your professional judgments that ultimately were reflected in the audit report, what standards did you apply?

A Existing standards of the accounting and auditing profession.

Q Did you sacrifice your own standards?

A No, sir.

Q Or your professional standards in reaching those judgments?

A No, sir.

Q Were they your best judgments, sir, at the time?

A Yes, they were.

* * *

[Trial transcript p. 6917 - Direct exam of Brown]

* * *

Q Did you ever have any personal knowledge that there was a fraud ongoing at PTL?

A No, sir, I did not.

Q Did anyone at PTL ever ask you to conduct your audit so that they could perpetrate a fraud?

A No, sir.

Q If they had, would you have done so?

A No, sir.

Q Mr. Brown, did you willingly assist Jim Bakker or anyone else at PTL in committing a fraud on Lifetime Partners?

A Absolutely not.

Q Did you in any way participate in a fraud on Lifetime Partners?

A No, sir, I did not.

* * *

[Trial transcript p. 7163 - Direct exam of Mangum]

Q During your review, Mr. Mangum, did you see anything, and I emphasize the word anything, that caused you to conclude that Deloitte was aware of and participated in a fraud?

A No, sir, I absolutely did not.

* * *

[Trial transcript p. 699 - Cross exam of Bailey]

* * *

Q As financial director in 1983 and '84, and during your time as an employee in PTL's finance department, did you have an opportunity to observe Deloitte's audit team at work?

A Yes.

Q You worked with them, in fact, from time to time, didn't you?

A Yes.

Q Based on your observations of them during that period of time, would you say they were competent?

A Yes, I would.

Q Did you think they did a good job?

A I do.

Q Based upon your opportunity to observe them and their work there at PTL in connection with the audits of PTL's financial statements, are you aware of [700] any occasion on which any Deloitte employee compromised his or her professional judgment in order to continue receiving audit fees from PTL?

A I'm not aware of any of that.

Q Not aware of any occasion where any Deloitte employee compromised their professional judgment for any reason, are you?

A No.

Q Based upon what you observed and what you know, are you aware whether -- are you aware that anyone associated with Deloitte aided and abetted a fraud on Lifetime Partners?

A No.

Q Do you believe that anyone associated with Deloitte conspired to defraud Lifetime Partners?

A No.

* * *

[Trial transcript p. 2239 - Cross exam of Dortch]

* * *

Q Now, Reverend Dortch, you have stated earlier in your testimony that you pled guilty in federal criminal court to defrauding Lifetime Partners?

A That's correct.

Q And a conspiracy -- being involved in a conspiracy to defraud Lifetime Partners?

A That's correct.

Q And in another proceeding you named the people with whom you conspired to defraud Lifetime [2240] Partners?

A Correct.

Q None of the people you named were associated with Deloitte Haskins & Sells, were they?

A No, sir.

Q And none of those parties was Deloitte Haskins & Sells?

A No sir.

Q And isn't it true, Reverend Dortch, that you did not conspire with Deloitte Haskins & Sells to defraud Lifetime Partners?

A Not to my knowledge.

[Trial transcript p. 3306 - Cross exam of Yorke]

* * *

Q And in that time period, did you have an opportunity to get to know the people at Deloitte?

A Yes.

Q Did you get to know Evan Webster in 1983?

A Yes.

Q Bob Brown?

A Yes.

Q Did there come a time that you got to know Guy Forcucci and Ted Leinback in 1984?

A Yes.

Q Now, how would you characterize the work they did at PTL and for PTL, that you are aware of?

A Well, I was, I saw them working hard and trying to do a good job under difficult circumstances.

Q They were wrestling with the same alligator you were, weren't they?

A Yes.

Q And trying to do their best, weren't they?

A Yes.

Q Did you ever believe that you were involved in a fraud while you were trying to render professional services at PTL?

A No.

* * *

[Trial transcript p. 295 - Direct exam of Strahowski]

* * *

Q Have you ever heard of the auditor's reports before this lawsuit was filed?

A Yes.

Q Did you ever receive a copy of those auditor's reports?

A No, sir, I did not.

Q So, you haven't read those auditor's reports?

A No.

* * *

[Trial transcript p. 924 - Direct exam of Tucker)

* * *

Q And you had never seen a financial statement in connection with the purchase of your Lifetime Partnership, had you?

A No. I wish I had of.

* * *

[Trial transcript p. 1061 - Cross exam of Teague]

* * *

Q Did you ever see any financial statements?

A Sir, when you --

THE COURT: Just answer that yes or no.

THE WITNESS: No, sir, I did not.

* * *

[Trial transcript p. 1460 - Cross exam of Stabile]

* * *

Q Likewise. Mr. Attridge was asking you some questions about financial statements and I just want to make sure it is clear. You never saw a financial statement, a PTL financial statement, that was audited by Deloitte Haskins & Selis?

A I never saw -- I never requested one.

* * *

[Trial transcript p. 1740 - Direct of Teague]

* * *

Q You never saw an audited financial statement for PTL, did you?

A No, I did not.

* * *

[Trial transcript p. 3152 - Direct exam of Dudley]

* * *

Q Now, did you ever see any financial statements or other documents from the auditors?

A No, I did not.

* * *

[Trial transcript p. 4254 - Cross exam of Eggan]

* * *

Q All right. It looks like Mr. Beach may be the only person on this list that we can say for sure received a copy of the 1985 audited financial statement [4255] prior to becoming a Lifetime Partner?

A That's correct.

* * *

[4256]

* * *

[4257]

Q So, at most, we have one who may or may not be in this lawsuit.

A That's correct.

Q How many Lifetime Partners were there, Mr. Eggan?

A 115,800.

Q Do you know whether Mr. Beach ever received an audited financial statement?

A All I know is the letter that Peter Bailey sent him, okay. No, I don't know he received the letter. Peter Bailey sent him one.

Q You certainly don't know whether he looked at it?

A That's right.

Q You certainly don't know whether he considered it when deciding to become a Lifetime [4258] Partner?

A That's correct.

* * *

[4259]

Q Mr. Eggan, do you have personal knowledge of anyone other than perhaps Mr. Beach, who received a 1985 audited financial statement before becoming a Lifetime Partner?

A No.

* * *

[Trial transcript p. 640 - Cross exam of Bailey]

* * *

Q As part of the subsequent events activity, Deloitte did obtain a letter from PTL; is that the case, a client representation letter?

A Yes, they did.

* * *

Q All right, Mr. Bailey, could you tell the jury, please, what is the purpose of the client representation letter in the course of an audit?

A It's to verify that, similar to what we went [641] through before, that there had been no major irregularities, that you have given them everything, and things have been properly recorded.

Q And you intended, when you signed this letter and gave it to Deloitte, you intended for Deloitte to rely on the representations in this letter?

A That's right.

* * *

Q Mr. Bailey, if you would, I would like to focus on this letter for a second, and what you represented to Deloitte in this letter. Now, what dates -- there are a couple dates on the second page of this letter, are there not?

A Yes.

Q What are they?

A August 31st, 1984 and October 22nd, 1984.

Q So, you were making these representations as of both those dates; is that correct?

[642]

A Yes, it looks like.

Q Would you read to the jury what is there, representation number one?

A "We are responsible for the fair presentation in the financial statements of financial position, result of operations and changes in financial position in conformity with generally accepted accounting principles.

Q That is PTL is responsible for that and not Deloitte?

A That's right.

Q All right. I[f] you would, look at number 3 and read the introduction to 3 and 3A?

A "There have been no irregularities involving management or employees who have significant roles in the system of internal accounting control, except as follows: None."

Q So, you are representing that none of those have occurred?

A That's right.

* * *

Q All right. If you would, read 3B?

[643]

A "Irregularities involving other employees that could have an effect on the financial statements except as follows: None."

Q All right. So you are representing again that you know of none of those?

A That's correct.

Q And with regard to the representations there in 3A and 3B, when you made them, you believed them to be true, didn't you?

A That's correct.

Q And you intended for Deloitte to rely on them?

A That's correct.

Q Now, if you would, please, Mr. Bailey, go down to number 6 and read the introduction to 6 and 6A?

A "There are no violations or possible violations of laws or regulations whose effects should be considered for disclosure in the financial statements or as a basis for recording a loss contingency, except as follows: None."

Q So, to your knowledge, when you made this representation, that was true?

A That's true.

Q You intended Deloitte to rely on that?

A That's right.

[644]

Q Deloitte was reasonable in relying on that?

A Yes, they were.

Q If you would turn over to page two, please, Mr. Bailey, and read number seven?

A "All unasserted claims or assessments that legal counsel has advised us are probable of assertion and must be disclosed in accordance with statement of financial accounting standards number five, have been disclosed."

Q And what you are representing there, isn't it true, Mr. Bailey, that any claims, any unasserted claims, claims that aren't yet made, haven't become lawsuits yet, but might become lawsuits, that you know about, have been disclosed?

A That's correct.

Q And to your knowledge, that was true?

A Yes.

Q And you intended for Deloitte to rely on that?

A Yes, I did.

Q And Deloitte did rely on that?

A Yes.

Q Now, anywhere in this two-page letter does it say that the Lifetime Partnerships have been oversubscribed or oversold?

[645]

A No.

Q As of 10/22/84?

A No.

Q And you believe that to be true?

A Yes.

Q And you intended for Deloitte to rely on it?

A Yes.

Q And they were reasonable in relying on it, weren't they?

A Yes.

Q Going back, that is your signature there?

A That's my signature.

* * *

[Trial transcript p. 1372 - Cross exam of Caudle]

Q Okay, I will step away. Would you tell what the purpose of that letter is, Mr. Caudle?

A Well, it was a regular audit letter pertaining to the fiscal year of Heritage Village Church [1373] and Missionary Fellowship, ending May 31, 1984.

Q And when you say "regular audit letter," it is a letter from your firm to the auditors advising them of certain information; is that correct?

A Yes. We had been requested to provide information and this was in response to that request.

* * *

Q Now, reviewing your letter of October 5th, can you determine from that letter as to whether or not any issue which may develop had been specified at that time?

A No, not by the revenue agents.

Q So, at that point in time no revenue agent had told you of any issue in the audit; is that correct?

A That's correct. I think you must -- just a brief explanation for why -- well, the agents requested, through document

request forms, documents that they wanted to review. They had requested special [1374] arrangements, special rooms to meet in down there. Basically we were turning over documents and, as we would turn them over, they generally would have another grocery list of request forms. We want more documents, and this had gone on month after month in 1984; but they never told us, I never was aware of any factual determinations that they were making, much less what would become the issues after they garnered whatever evidence they were looking for.

Q And in the fall of 1984, then, you told what you knew to Deloitte when you wrote that letter; is that correct?

A Well, I responded in proper form, I thought.

Q Yes, sir. And no IRS agent, then -- let me strike that question.

Who was on the power of attorney for this audit, the IRS audit? I believe it was just your firm, wasn't it?

A I believe that's correct.

* * *

[Trial transcript p. 4552 - Cross of Moore]

Q Did you read the Yorke letter to Deloitte?

A I'm sure I did, yes.

Q Did it say a single word about time share?

A No.

Q And in fact, didn't it, sir -- I will put it on the screen.

[4553]

* * *

Q This is a copy of Mr. Yorke's letter, sir. Do you see this line right here?

A Yes, I do.

Q "We know of no unasserted claims against Heritage Village Church and Missionary Fellowship Inc."

A Right.

Q Don't you think Deloitte was entitled to rely on that.

MR. ANDERSON: I didn't understand.

Q Don't you think Deloitte was entitled to rely on that representation?

A Yes.

Q That is not even something about which reasonable auditors could disagree, is it?

A That's correct.

Q And do they make any reference in the letter, to your recollection, about any qualification?

A Qualifications of their response?

Q Yes.

A I don't recall whether they did or not. A number of responses to make that limitation.

Q Do you know in the fall of 1984 they were [4554] the general counsel?

A That's correct.

* * *

Q Don't you know Mr. Yorke was the one doing most of the work?

A Yes, that's correct.

Q Do you see any qualification in that letter anywhere about material unasserted claims? I will put each page on the board for you?

A No, I don't.

* * *

[Trial transcript p. 6181 - Direct of Klein]

* * *

Q I'm going to show you a document, Ms. Klein, and ask you if you can identify it. It is Deloitte Exhibit 102517?

A This is a copy of the form that we use for management representations.

[6182]

Q Now, would you read paragraph one, please, ma'am?

A "We are responsible for the fair presentation in the financial statements of financial position, results of operation and

changes in financial [6183] position in conformity with generally accepted accounting principles."

Q And who is the "we"?

A The we is the client, PTL, in this case.

Q Okay. Would you read number two?

A "The company has made available to you all financial records and related data and all minutes of the meetings of stockholders, directors and committees of directors or summaries of actions of recent meetings for which minutes have not yet been prepared."

* * *

Q Why do you get this representation?

A Well, this documents what they have told us previously.

Q Documents --

A Documents the facts th[at] are their financial statements and that they have made all the information available to us.

Q And did you as an auditor rely on this letter?

A Yes, I did.

Q Would you read paragraph 3A, please, ma'am?

A "There have been no irregularities involving [6184] management or employees who have significant roles in the system of internal accounting control, except as follows." And then the reply, which is PTL's reply, is "none."

Q All right. Now, this is a Deloitte form, isn't it?

A Yes, we use a Deloitte form to do this.

Q Okay. And whose handwriting is this?

A That is my handwriting.

Q Okay. Now, who typed in the "none"?

A Peter Bailey or someone who he assigned to type it in.

Q You didn't type in the "none"?

A No, I didn't type it in.

Q Okay. Would you read 3B, please, ma'am?

A "There have been no irregularities involving other employees that could have an effect on the financial statements, except as follows." And again, the answer is "none." PTL's answer is "none."

Q Who typed in the "none"?

A Either Peter or someone who he designated.

Q And would you read C, please?

A "There have been no communications from regulatory agencies concerning noncompliance with, or deficiencies in financial reporting practices that could [6185] have an effect on the financial statements, except as follows." And again PTL's answer is "none."

Q Okay. Could you read four? By the way, who typed that in?

A Peter or whoever he asked to type it.

Q Could you read four, please?

A "The company has no plans or intentions that may affect the carrying value or classification of assets and liabilities, except as follows." And again the answer is "none."

Q Who typed it in?

A PTL.

Q Would you read 6A, please, ma'am?

A 6A. "There are no violations or possible violations of laws or regulations whose effects should be considered for disclosure in the financial statements or as a basis for recording a loss contingency, except as follows." And PTL's answer is "none."

Q Okay. Now, would you read, is this the second page of that exhibit?

A Yes.

Q Would you read 6B, please?

A "There are no other material liabilities or gain or lost contingencies that are required to be accrued or disclosed by statement of financial [6186] accounting standards number five,

except as follows." And the response this time from PTL is "General IRS audit for year end 5/31/80, 5/31/81, and 5/31/82."

Q That was the IRS audit, the general IRS audit for the year end 5/31/80, '81, and '82?

A Yes.

Q Disclosed in the financial statement?

A Yes.

Q Do you know where it was disclosed?

A It was in the footnotes. I don't remember the number of the footnote.

Q Would you read number seven, please?

A "All unasserted claims or assessments that legal counsel has advised us are probable of assertion and must be disclosed in accordance with statement of financial accounting standards number five have been disclosed."

Q Would you read number eight?

A "There are no transactions that have not been properly recorded in the accounting records underlying the financial statements."

Q Go back to seven. What did you understand seven to mean?

A Number seven means that they have disclosed anything that their legal counsel has advised them [6187] should be disclosed in accordance with financial accounting standard five, which addresses contingencies.

Q What is an unasserted claim?

A An unasserted claim would be something, would be a claim that has not been formally made at that time, but you know it is there.

Q So, if PTL knew there was a claim there that hadn't been made, you would have expected them to have told you about it at this point, certainly?

A Yes.

Q Did you rely on number seven?

A Yes.

Q And would you read number 13, please?

A "The company has complied with all aspects of contractual agreements that would have an effect on the financial statements in the event of non compliance."

Q Did you rely on that representation?

A Yes.

Q How about number 14?

A "No events have occurred subsequent to the balance sheet date that would require adjustment to or disclosure in the financial statements, except as follows." And the reply is "The sale of the village at Park Road."

[6188]

Q Okay. Now, who signed it?

A The first signature is Peter Bailey.

Q What was his position?

A He was VP of finance.

Q And who else signed it?

A That signature is Reverend Dortch's signature.

Q And what was his position?

A I draw a blank when you say that. I'm sorry, but I do.

Q Was he superior to Peter Bailey?

A Yes, definitely.

Q Was he second in command among the executives of PTL?

A Yes.

Q What was the date?

A October 22nd, 1984.

Q The typed date is here?

A August 31, 1984.

Q Do you know why the two dates?

A The date August 31st was the date of our report, with the exception of one footnote, and that date was, I believe it was October 24th, wasn't it, on the financial statements.

Q So, this is to get this representation as of [6189] the end of either of the notes on your, dates on your financial statement?

A Yes.

Q Now, at the time you were requesting representations from your client, do you also get letters from the lawyer for the client?

A Yes, we do.

Q Do you get those letters at the end of the audit?

A Yes.

Q Is that an important step in the audit?

A Yes, it is.

Q Why is it?

A Again, that is one of the steps in subsequent event work where we are looking for any items that might require disclosure in the financial statements.

* * *

[6190]

* * *

Q And who sends that letter to the lawyer?

A The client does.

Q And in the case of PTL, how many lawyer letters did you get?

A Five.

Q Did any of the five law firms that responded in their letters to Deloitte say that the Lifetime Partnerships were time shares and there was an unasserted claim with respect to that?

A No.

Q Did any of those letters say a word about [6191] the Lifetime Partnerships being securities?

A No.

Q Did any of those letters express the belief by the lawyers that PTL would lose its tax-exempt status?

A No.

Q Was one of the letters you received from a fellow named John Yorke?

A Yes, it was.

Q And who was John Yorke, or who is John Yorke? He is still alive.

A General counsel for PTL.

Q And was he with the Knox law firm.

A Yes.

Q I will hand you, Ms. Klein, Deloitte Exhibit 5-102-530 and ask you if you can identify that document?

A Yes. This is the attorney's letter that we got from John Yorke.

* * *

[6192]

* * *

Q Let me put this letter up on the board, please, ma'am. Did Mr. Yorke, in his letter, limit his response to the inquiry in any way?

A No, he didn't.

Q Did the Yorke letter -- let me just ask you to read a portion of it. The letter tells you about some specific things that are being handled, doesn't it?

A Yes, it does.

Q For example, the F.N. Thompson Construction Company, a lawsuit in Mecklenburg County?

A Right.

* * *

A. Right.

Q Those are matters being handled by his firm, about which his firm has knowledge?

[6193]

* * *

Q Does it tell you a word about time shares?

A No, nothing in there about time shares.

Q Does it say anything about securities?

A No, it doesn't.

Q Does it say a word about losing tax-exempt status?

A No, not at all.

Q Would you read this sentence here?

A "We know of no unasserted claims against [6194] Heritage Village Church and Missionary Fellowship Inc."

Q What did you understand that to mean?

A Well, basically that there are no unasserted claims, that is about as plain as you can say it, really.

Q And would you read the next sentence?

A "Mr. Bailey's understanding in connection with unasserted claims or assessments, as found in the second paragraph of page two of his letter to me, is correct."

Q And after you read that, would you have expected, would you have expected Mr. Bailey to have told you if there was an unasserted claim he knew about?

A Yes, I would.

Q Would a violation of the South Carolina time share law have been such an unasserted claim?

A I suppose it would have been.

Q Was one of the attorneys you got a letter from a fellow named Tom Givens?

A Yes, it was.

Q I believe he has already testified in this proceeding. Was one of those fellows you got a letter from a man named Lloyd Caudle?

A Yes.

Q With the then law firm of Caudle and Spears.

[6195]

A Yes.

Q Did any of these attorneys mention anything about security or time shares?

A No, none of them did.

Q Not attorney Givens?

A None of the letters mentioned securities or time shares.

Q Not Mr. Caudle?

A No.

Q Not Mr. Yorke?

A Not Mr. Yorke.

* * *

[Trial transcript p. 6467 - Direct of Leinbach]

* * *

Q Did you discover anything in the work papers, planning memoranda, special questionnaire, special risk questionnaire, that said we identify time share as special audit risk?

A No.

Q Did you receive a letter in the fullness of time from general counsel of PTL?

A Yes, we had the client request an attorney's letter from John Yorke, general counsel, and we received that letter back.

Q And did that letter say . . . [6468] anything about shares?

A No, it did not.

Q Did the letter say anything about unasserted claims?

A Yes.

Q What did it say?

A It says in his opinion there were not any unasserted claims related to PTL.

Q Now, if he had known anything about this being an unasserted claim with respect to time-share violation, what would your expectation have been with respect to that letter?

A I would have expected it to be mentioned in the letter.

Q Did you ever see any other reference to time share anywhere else as it related to Heritage Grand, in connection with this audit?

A No, sir.

Q Was it an issue you ever considered one single time?

A No, sir.

Q Never raised in a single one of the meetings you attended with the lawyers; right?

A Not that I recall.

[Trial transcript p. 7160 - Direct exam of Mangum]

* * *

Q All right. Do you have an opinion as to whether or not Deloitte was required during its audit to specifically ask PTL's outside counsel whether the Lifetime Partner memberships were time shares?

A Yes, sir, I do.

Q What is that opinion?

A That they did not.

Q And what is the basis for that opinion?

A In first place, PTL already had a time-share program and so they knew the rules and they were accounting for those time shares properly, so Deloitte was entitled to rely on that to the extent that if PTL knew about time shares and you got to account for them, that they would not knowingly violate the time-share rules. So, they had this one and they, as I say, they were accounting for those properly.

Then, secondly, this was, this things was publicized all over the country. It was in the news and everywhere else, but yet nobody from no state had even made a claim that they were time shares. In fact, South Carolina had been in the PTL a couple years before in connection with the other time-share programs, so they [7161] knew PTL had time shares. They didn't raise the question.

So, with those two things, you have nobody from the outside saying it is one, and then to wrap it all up, we know that the

attorneys knew about it and had addressed the question. The attorneys come back and send a letter saying there is no problems. So as far as we are concerned, the auditors are concerned, the attorneys say there is no problem, there are no unasserted claims which is the category this would come in, so there is absolutely no basis for Deloitte to go back now and ask the attorney about something which the attorney -- he knows the attorney already knows about and has addressed.

* * *

Q Do you have an opinion as to whether or not Deloitte was required, during its audit, to specifically ask PTL's outside counsel whether the Lifetime Partner memberships were securities?

A Yes, sir, I do.

Q What is that opinion?

A That they did not.

Q Why do you say that?

[7162]

A Somewhat the same reason. There was no indication from anybody whatsoever, except one small comment from some attorneys, that this might be a security. Here again, part of the logic is that if the attorneys knew about it, they would answer. They are supposed to advise that. So, this thing really, there was nothing there to make them believe that this was a security and you just don't go out asking unless you have a basis for doing so.

Q All right, sir. Do you have an opinion as to whether or not Deloitte was entitled to rely upon the representation letters it received from attorneys?

A Yes, sir, I do.

Q And what is your opinion?

A They are entitled to rely 100 percent upon those, yes, sir.

Q Do you have an opinion as to whether Deloitte's audits of PTL's financial statements, sir, were performed in accordance with professional and ethical standards?

A Yes, I do.

Q And what is your opinion?

A That they were performed, there is no question in my mind they were performed in accordance with professional and ethical standards.

[Trial transcript p. 981 - Cross exam of Speakman]

* * *

Q At the time you left the ministry in August of 1984, is it accurate to say, Reverend Speakman, that it was your understanding that the IRS had not identified the particular issues which it was looking at in connection with this audit of PTL?

A That was my understanding.

Q You had heard speculation about issues?

A Yes, sir.

Q From the attorneys?

A Correct.

* * *

[982]

* * *

Q You had heard speculation about the issues?

A Yes.

Q To your knowledge, the IRS had not identified the issues before 1984?

A That's right.

Q You did not know they had proposed that PTL's tax exemption be revoked?

A Right.

Q None of the attorneys you spoke with stated the legal opinion that PTL's tax exemption would be revoked?

A Not to my knowledge.

* * *

[Trial transcript p. 1686 - Direct exam of Leinbach]

* * *

Q Now, Mr. Anderson asked you about, as a part of your examination, about some words you wrote at a meeting?

A That's correct.

Q Something like "IRS will find inurement. It it will go to court. We'll lose"?

A Yes, sir.

Q He didn't ask you any questions about that meeting, did he?

A No, sir, he did not.

Q Or the circumstances under which you took those notes?

A That's correct.

Q Did you ever reach that conclusion?

A No, sir, I did not.

Q Did anybody on the audit team reach that conclusion?

A No, sir, they did not.

[1687]

* * *

Q Did you in fact make a memorandum, a written, typed memorandum of that meeting?

A Yes, sir, there is a memo to the working papers.

* * *

[1688]

Q Does it say in there that typed memorandum of the meeting, does that record the important parts of that meeting?

A Yes, it does.

Q Does the typed memorandum forecast that PTL will lose its exempt status?

A No, it does not.

* * *

Q To your knowledge, did anybody on the audit team ever reach the conclusion that PTL would lose its exempt status?

A No.

* * *

[Trial transcript p. 2532 - Direct exam of Webster]

* * *

Q Do you know of any inaccurate information that the Caudle firm gave to the IRS, sir?

A I have no personal knowledge of anything the Caudle firm gave the IRS.

Q Well, you discussed with the Caudle firm the IRS examination, sir?

A I never said that.

Q Okay. Did you ever discuss with the Caudle firm the IRS examination?

A What we did with the Caudle firm was we wrote them a letter as part of our audit each year asking them specifically to tell us, to update us on the IRS audit, and each year they would respond to us as part of our audit procedures, part of professional standard, adhering to professional standard. They would advise us of the status of the IRS examination. They advised us of the status when there was an IRS letter examination, and then, this is the last -- the last that I would have knowledge of, is they advised us that the IRS had requested to come in and do a more complete audit, a [2533] field audit, for certain periods.

Q My question to you, sir, did you ever have any discussion with any IRS agents -- strike that.

With Mr. Caudle or Mr. Ethridge or any member of his firm, concerning the IRS audit, discussion, sir?

A Again, other than the correspondence, the attorney's letter that we sent out as part of the audit and the response that we got from the audit, I don't recall any specific discussions with the Caudle firm.

Q So, at no time did you pick up the phone and say, "Mr. Caudle, can you tell us how the IRS exam is going;" is that right?

A They told us in a letter how the IRS exam was going.

Q No, sir, that is not my question.

A That is the purpose of their letter; that is the purpose of the letter you have on the screen right now.

* * *

[Trial transcript p. 3316 - Cross exam of Yorke]

* * *

Q Now, the actual on site IRS examination began in late '83 or early '84, didn't it?

A I'm not sure. I don't remember when it began.

Q But it began sometime before this meeting?

A Yes.

Q And one of the focal points of the meeting was the effort of the IRS to gather documents, wasn't it?

A Yes.

Q And that is what was going on at that point in time, wasn't it?

A Yes.

Q And at that point in time the IRS had not identified the issues it was examining, had it?

A No.

Q And it certainly hadn't back in January of 1983, had it?

A No.

* * *

[Trial transcript p. 5379 - Direct exam of Ethridge]

* * *

Q So, in fact, Deloitte, in connection with its work out at PTL was dependent on members of your firm for what it learned about the ongoing IRS audit, either you or someone at PTL?

A Yes, sir, that is correct.

Q During the time that you were with the Caudle firm, Mr. Ethridge, did you ever tell anyone from Deloitte that the IRS had raised private inurement as an issue?

A No, sir. The IRS never raised any issues.

Q So, during the time you were there, what issues did the IRS identify?

A The Internal Revenue Service had not raised any issues at all.

Q As of July '84?

A As of July 1, 1984.

Q Did anyone from the IRS ever tell you formally or informally that they planned to challenge PTL's tax-except status as a result of that audit?

A Absolutely not.

Q When you left the Caudle firm in July of 1984, had you concluded in your own mind that the IRS was going to challenge PTL's tax-exempt status?

A No, sir, I had not made that conclusion.

Q During the time that you were with the

[5380]

Caudle firm, Mr. Ethridge, did you ever tell anyone from Deloitte that you had reached the legal opinion that the IRS would find private inurement, it would go to court and PTL would lose?

A No, sir.

Q Did you ever form that opinion?

A No, sir.

Q Did you ever hear any of the professionals who were working on behalf of PTL in connection with PTL express that opinion?

A No, sir.

* * *

[Trial Transcript p. 2224 - Cross exam of Dortch]

* * *

Q While Deloitte was serving as PTL's auditors, up through the issuance of that May '84 report, on PTL's financial statement for May 31, '84, while Deloitte was serving as PTL's auditors, did any attorney who was representing PTL tell you that they believed PTL was going to lose its tax-exempt status?

A I have no recollection of that.

Q In fact, I believe you testified in response to a question by Mr. Pitts, that even up through 1987 the attorneys were telling you that they believed that PTL would prevail, and that the IRS would not revoke PTL's tax-exempt status?

A That's correct.

Q That certainly wasn't different in 1984?

A No, sir.

Q All right. And in fact, throughout 1984, while Deloitte was acting as PTL's outside auditors, you certainly believed that PTL would not lose its tax-exempt status?

A That's true.

* * *

[Trial Transcript p. 2189 - Cross exam of Dortch]

* * *

Q Is this a letter that was prepared by one of those tax attorneys for PTL and directed to the board of directors of PTL?

A Yes, sir.

Q And are you shown as a carbon copy on that letter?

A Yes, sir.

Q All right, sir. What is the date on that letter?

A April 6th, 1987.

Q 1987?

A Yes, sir.

Q Let me, if I could, ask you to turn to Page 6 of that document. Let me address you to the first paragraph which I have placed here on the screen. Let me circle it so we will all be looking at the same thing. Will you read, sir, this advice you received from your lawyers in 1987 relative to the IRS examination?

A "For the reasons set forth in our December 1st legal memorandum, we do not believe that the IRS should prevail on the revocation issue for 1981-1983. Although we have not had a chance to fully review and [2190] analyze all the facts relating to the 1984, 1985 audit, we would expect that all of the arguments that we raised

to refute the proposed revocation issue for 1981-1983, would again be applicable for 1984, '85. We have not, of course, had an opportunity to review or analyze the possible impact of the Jessica Hahn settlement payment on the church's tax-exempt status, although we have tentatively identified certain arguments that we could raise to counter any private inurement assertions by the IRS."

Q Thank you, sir. So, Reverend Dortch, as late as 1987, after Reverend Bakker had resigned, you were being advised by your lawyers that you could prevail on the revocation issue relative to private inurement, were you not?

A Yes, sir.

Q And that was consistent with the advice that you had gotten throughout the time this had been an issue with PTL, was it not?

A Yes, sir.

* * *

[Trial Transcript p. 6127 - Direct exam of Klein]

* * *

Q Do you recall approximately what the amount of Lifetime Partner contributions was, in round numbers, as of May 31, 1984?

A Approximately $17 million.

Q And were those Lifetime Partner contributions recorded in the financial statements of PTL at any point?

A Yes, they were. They were recorded as deferred revenue on the balance sheet.

[6128]

Q And what do you mean by deferred revenue?

A Deferred revenue is listed on the balance sheet rather than the income statement. The monies had been received, but we had not, or the client had not recognized any revenue from them at that point.

Q Did you ever seek, during the course of that audit or at any other time, to determine how many Lifetime Partner contributions had come in after May 31, 1984?

A No, sir, we didn't.

Q Why not?

A Because we were auditing as of May 31st, 1984. That is the period of time that we were looking at.

Q Would you tell the jury whether or not that was ever an issue in your mind?

A No, is wasn't.

Q And who did that work on the audit?

A Well, I did and my staff did.

Q Did you personally determine how much the Lifetime contributions had been as of May 31, 1984?

A I personally got it from the general ledger, yes.

* * *

[Trial Transcript p. 1303 - Cross exam of Eggan]

* * *

Q All right. You were aware that Deloitte Haskins & Sells audited PTL up through the end of the fiscal year May 31, '84?

A Yes.

Q To the best of your recollection, you never provided any information regarding the number of Lifetime Partners to any of those auditors from Deloitte who were out there doing that audit?

A No.

Q And you never provided them with any information regarding the amount of Lifetime Partnership money that had come in?

A No.

Q Now, Mr. Eggan, I think you may have just addressed this, but in fact, isn't it true that as of the summer of 1984, when Deloitte was doing its audit, June, July and August of 1984, you weren't even running these kinds of reports?

A That's correct.

Q These reports weren't available to anyone
[1304]
from Deloitte?

A They weren't available to anybody.

Q And in fact, they weren't available until a year, year and a half down the road?

A That's correct, late '85, '86.

Q So, Deloitte couldn't have seen any of these?

A No.

* * *

Q But, and you understand -- well, if someone from Deloitte had had information regarding the amount of Lifetime Partnership money that had come in by May 31, 1984, the end of the fiscal year they were auditing, they would have seen that the total amount of money was $17,238,256; is that correct?
[1305]

A Total Lifetime money, yes, sir.

Q For the Heritage Grand, $17,221,781?

A That's correct.

Q And to get the number of Lifetime Partners, the only way to do it at that point in time was to take that amount of money and divide by a thousand?

A That's correct.

Q So, they would have known as of May 31, '84, that there were about 17,000 Lifetime Partners?

A That's right.

Q Now, Mr. Eggan, is it fair to say you understood the limit on the Heritage Grand Hotel to be 50 percent of the rooms available?

A Yes.

Q Now, are you aware that in September of 1984, Mr. Bakker announced, PTL announced, they were going to build the Heritage Tower?

A Yes.

Q And that created an additional 30,000 Lifetime Partnerships?

A That's correct.

Q All right. And based on the 50 percent of the number of rooms in the Heritage Grand, it works out to about, or to a little over 30,000 Lifetime Partnerships available in the Heritage Grand Hotel; is [1306] that right?

A That's correct.

Q So, there were about, once Mr. Bakker announced the Tower, there were approximately 60,000 Lifetime Partnerships available; is that right?

A That's right.

Q All right. That would have been true, they began to promote and let people acquire those Lifetime Partnerships in September of '84; is that correct?

A Probably. I don't know that exact date.

Q From that point forward, there would have been 60,000 Lifetime Partnerships available?

A That's correct.

Q Now, there came a time when you began -- I think you have discussed this with Mr. Pitts -- when you began to write some memos to your superiors expressing your concern that the number of Lifetime Partnerships had gone too high?

A When they exceeded the 50 percent.

Q And that would have been in May of 1985?

A Approximately, without seeing a memo it is hard for me to pinpoint the date, but that is approximate, yes.

Q In any event, you never showed any of those memos to anyone from Deloitte?

[1307]

A No.

Q Never discussed those concerns with anyone from Deloitte?

* * *

[Trial Transcript p. 3794 - Cross exam of Rule]

* * *

Q Good morning, Mr. Rule. My name is Jim Phillips, and I represent Deloitte Haskins & Sells. Mr. Wallas showed you a number of memos; he put them up on the board. It's true, isn't it, you never showed any of those memos to anyone from Deloitte Haskins & Sells?

[3795]

A That is true.

Q And in fact, you never expressed to anyone from Deloitte Haskins & Sells any concerns that the Lifetime Partnerships might be oversold?

A That's true.

Q Now, the memos, in fact, Mr. Rule, if you will look at the memos, the memos that Mr. Wallas showed you are from June of 1985, July of 1985, August of 1985, September of 1985, and October of 1985; isn't that right?

A That's true.

Q And I believe you testified that the first memo or the first time you had any concerns about the Lifetime Partnerships being oversold was in the spring of 1985?

A That's true.

Q You didn't have any concerns prior to May 31st, 1984 that the Lifetime Partnerships were oversold?

A No.

Q Or in the summer or early fall of 1984, that the Lifetime Partnerships were oversold?

A No.

* * *

[Trial Transcript p. 6179 - Direct exam of Klein]

* * *

Q Now, you said you made some inquiries as a part of your subsequent event work?

A Yes.

Q To whom did you direct your inquiries?

A To Peter Bailey.

Q Did he tell you that the Lifetime Partnerships had been oversubscribed or oversold?

A No, he didn't.

Q Did he tell you that there were more than 25,000 Lifetime Partners had been subscribed or sold at

[6180]

any date?

A No.

Q Did you ever receive any information that there had been more than $17 million, roughly, received from Lifetime Partners?

A No.

Q From anybody?

A No.

Q During the course of your subsequent event work, were you told or did anything unusual come to your attention --

A No.

Q -- with respect to the monies that were received from the Lifetime Partners?

A No, I don't think so.

* * *

[Trial Transcript p. 6938 - Direct exam of Brown]

* * *

Q All right, Mr. Brown, let's talk about oversales of Lifetime Partnerships, that issue, for a second?

A Okay.

Q Would you state for the jury whether or not it ever came to Deloitte's attention that there had been an oversale of Lifetime Partnerships after May 31, 1984?

A No, sir, it did not.

Q Was the possible oversales of Lifetime Partnerships identified as an audit issue or risk during the planning session?

A We had never identified that as a risk or a problem, so it never was considered to be something that we would look into.

Q Why didn't you identify it as a risk?

A Well, we understood the limit that was on the sale of Lifetime Partnerships, and we reasonably expected the ministry to live up to that, and at May 31st they had not reached that level, but we reasonably expected they probably would at some point.

* * *

[Trial Transcript p. 649 - Cross exam of Bailey]

* * *

Q Mr. Bailey, did you prepare this document specifically to respond to Deloitte's expressed issue about the going concern question?

A That and other things. This was also a cash projection that we used at PTL, but it was also prepared in mind that Deloitte was requesting figures.

Q You provided these to Deloitte?

A Yes.

Q You intended for Deloitte to rely on them?

A Yes.

* * *

[Trial Transcript p. 660 - Cross exam of Bailey]

* * *

Q Is it your understanding, Mr. Bailey, that based on the information that you provided to Deloitte in these projections, Deloitte decided not, or decided that they were not required to qualify their opinion on PTL's May 31, 1984 financial statement?

A That's correct.

Q Do you believe that was a proper conclusion?

A Yes, I do.

Q You don't believe that report should have been qualified for going concern?

A No, it should not have been.

* * *

[Trial Transcript p. 870 - Recross of Bailey]

* * *

Q Let me ask you one last question, Mr. Bailey. You were asked about the going concern problem a number of times and whether PTL would continue to exist.

A Right.

Q We all know now that PTL ceased as a going concern in about June of '87, don't we?

A Correct.

Q Isn't it true that the reason that PTL ceased as a going concern was that Jim Bakker resigned because of blackmail, if you will, relative to some encounter that he had with Jessica Hahn?

A That was a major contributing factor, yes.

Q And were it not for that, don't you believe that PTL would have continued as a going concern?

A It would have had rough times. It always had rough times. I believe it would have, yes.

Q You believe it would have continued?

A I believe so.

* * *

[Trial Transcript p. 1675 - Cross of Leinbach]

* * *

Q Now, you have been asked questions about going concern. Did PTL in fact continue to exist as a going concern for another year?

A Yes, sir, they did.

[1676]

Q Did they -- did PTL continue to exist as a going concern for two more years?

A Yes, sir.

Q Did PTL continue to exist until June of '87 as a going concern?

A That's correct.

Q What is the last year that Deloitte audited PTL, Mr. Leinbach?

A May 31, 1984.

Q And not for any period after that time?

A No, sir.

* * *

[Trial Transcript p. 6921 - Direct exam of Brown]

* * *

Q So, in order not to qualify your audit report on PTL's May 31, '84 financial statement, is it correct to say that you had to be convinced and believe that PTL would continue in business through May 31, 1985?

A That's correct.

Q All right. Do you know, Mr. Brown, did PTL continue in existence through May 31, 1985?

A They did. They continued past that.

Q Did they continue through May 31, 1986?

A They did.

Q Did they continue through May 31, '87?

[6922]

A Into 1987. Exactly when in '87, it was the spring of '87, I think that the problems arose.

* * *

[Trial Transcript p. 640 - Cross of Bailey]

* * *

Q As part of the subsequent events activity, Deloitte did obtain a letter from PTL; is that the case, a client representation letter?

A Yes, they did.

Q I think Mr. Pitts showed you the one that Laventhol obtained during 1985 and 1986?

A Right.

Q Mr. Bailey, let me hand you what is marked as Deloitte Exhibit 5-102517. Can you identify that for the record, please?

A It's a two-page representation letter to the auditors, claiming certain things, you know.

Q Is that your -- on the second page there, is that your signature?

A Yes, it is.

Q And is that -- are you familiar with the signature of Reverend Dortch?

A It looks like his signature.

Q All right. So, you signed this letter to Deloitte?

A Yes.

Q All right, Mr. Bailey, could you tell the jury, please, what is the purpose of the client representation letter in the course of an audit?

A It's to verify that, similar to what we went

[641]

through before, that there had been no major irregularities, that you have given them everything, and things have been properly recorded.

Q And you intended, when you signed this letter and gave it to Deloitte, you intended for Deloitte to rely on the representations in this letter?

A That's right.

Q If I can, Mr. Bailey, let me put the first page up on the big screen.

MR. ANDERSON: Could we see the top half, Your Honor?

MR. PHILLIPS: I don't think there is anything else up there.

BY MR. PHILLIPS (CONTINUING):

Q Mr. Bailey, if you would, I would like to focus on this letter for a second, and what you represented to Deloitte for a

second, and what you represented to Deloitte in this letter. Now, what dates -- there are a couple dates on the second page of this letter, are there not?

A Yes.

Q What are they?

A August 31st, 1984 and October 22nd, 1984.

Q So, you were making these representations as of both those dates; is that correct?

[642]

A Yes, it looks like.

Q Would you read to the jury what is there, representation number one?

A "We are responsible for the fair presentation in the financial statements of financial position, result of operations and changes in financial position in conformity with generally accepted accounting principles".

Q That is PTL is responsible for that and not Deloitte?

A That's right.

Q All right. I[f] you would, look at number 3 and read the introduction to 3 and 3A?

A "There have been no irregularities involving management or employees who have significant roles in the system of internal accounting control, except as follows: None."

Q So, you are representing that none of those have occurred?

A That's right.

Q I believe you testified earlier that irregularities were similar to illegal acts; is that correct?

A True.

Q All right. If you would, read 3B?

[643]

A "Irregularities involving other employees that could have an effect on the financial statements except as follows: None."

Q All right. So you are representing again that you know of none of those?

A That's correct.

Q And with regard to the representations there in 3A and 3B, when you made them, you believed them to be true, didn't you?

A That's correct.

Q And you intended for Deloitte to rely on them?

A That's correct.

Q Now, if you would, please, Mr. Bailey, go down to number 6 and read the introduction to 6 and 6A?

A "There are no violations or possible violations of laws or regulations whose effects should be considered for disclosure in the financial statements or as a basis for recording a loss contingency, except as follows: None."

Q So, to your knowledge, when you made this representation, that was true?

A That's true.

Q You intended Deloitte to rely on that?

A That's right.

[644]

Q Deloitte was reasonable in relying on that?

A Yes, they were.

Q If you would turn over to page two, please, Mr. Bailey, and read number seven?

A "All unasserted claims or assessments that legal counsel has advised us are probable of assertion and must be disclosed in accordance with statement of financial accounting standards number five, have been disclosed."

Q And what you are representing there, isn't it true, Mr. Bailey, that any claims, any unasserted claims, claims that aren't yet made, haven't become lawsuits yet, but might become lawsuits, that you know about, have been disclosed?

A That's correct.

Q And to your knowledge, that was true?

A Yes.

Q And you intended for Deloitte to rely on that?

A Yes, I did.

Q And Deloitte did rely on that?

A Yes.

Q Now, anywhere in this two-page letter does it say that the Lifetime Partnerships have been oversubscribed or oversold? [645]

A No.

Q As of 10/22/84?

A No.

Q And you believe that to be true?

A Yes.

Q And you intended for Deloitte to rely on it?

A Yes.

Q And they were reasonable in relying on it, weren't they.

A Yes.

Q Going back, that is your signature there?

A That's my signature.

Q All right. Mr. Bailey, you and Mr. Anderson discussed what we have called the going concern issue in this case some. I believe you and Mr. Pitts did as well?

A Yes.

Q All right. Did there come a time when Bob Brown expressed to you that Deloitte was considering qualifying the financial statement which we looked at as Exhibit 1, PTL's -- qualifying his opinion on the May 31st '84 financial statement because Deloitte didn't believe PTL couldn't continue as a going concern?

A Yes.

Q They were thinking about putting a going

* * *

[Trial Transcript p. 2613 - Cross of Pridgen]

* * *

Q Mr. Pridgen, I'm Gene Carr, Mr. Bakker's attorney. You indicated that your sole connection with PTL was to register a time share that they had on the premises; is that correct?

A The only work that I did for PTL related to time-share registrations and this one question about the Partnership, the Lifetime Partner offer.

Q Was your practice in Myrtle Beach at that time?

A Yes, it was.

Q Who contacted you from PTL about that?

A About the --

Q Registration of the time share?

A Registration?

Q Yes.

A I don't remember who I first was in contact with from PTL.

* * *

[Trial Transcript p. 2619 - Cross of Pridgen]

* * *

Q Mr. Pridgen, you never communicated either in writing or orally to anyone from Laventhol & Horwath any of these concerns you had about the Lifetime Partnership program, did you sir?

A No, I did not.

* * *

Q Mr. Pridgen, I will ask the same question. I'm Jim Williams, the lawyer for Deloitte Haskins & Sells. I will ask you the same question Mr. Pitts just asked you. You never communicated with Deloitte concerning this opinion, did you, sir?

A No, I did not.

* * *

[Trial Transcript p. 4973 - Cross of Cortese]

* * *

Q All right. Would you tell us -- you don't really need to go through everything you said yesterday, but just again refresh our recollection as to what that was about.

A In 1979, the month of December, I received a call from Reverend Richard Dortch in which he asked me to come and help and be on the board of PTL. I explained to him that I don't think I could help him much on the board in terms that I wasn't a minister of mechanics and knowledge of building or finances or anything like that, I mean, high technology. In the little things, I can handle them, but not in the gib. And I explained that to him and he said no, that was not why he was calling me. He wanted me mainly for my expertise in the Bible, in teaching and my expertise in spiritual affairs; that he wanted on the board somebody that would once again be someone to represent more ministry than secular.

* * *

[4974]

* * *

Q Now, when you first went down, were you introduced to the other directors on the board?

A Yes, right away.

Q Would you tell the jury about that?

A In our first meeting I met Efrem Zimbalist.

Q Would that be this gentleman right here?

A Yes, that is Efrem Zimbalist. I met the gentleman next to him, Mr. Cookman, Reverend Cookman.

Q This is Charles Cookman?

A Yes. Reverend Dortch is next to him, that invited me, and A. T. Lawing was at that meeting, Reverend Jim Bakker was there, and myself. That was the original board.

Q Okay. Would you tell us very briefly what you learned about these people when you sat on the board with them?

A Well, I learned that they were experienced and seasoned people in both --

Q Let's take one individually. What about Mr. Zimbalist, what did you learn about him?

A Okay. Mr. Zimbalist was a man well versed in entertainment and well versed in cinematography, in terms of being an actor, and very representative of his field, but I also found out that he was a very good [4975] businessman, with several businesses in California.

Q All right. And now Mr. Cookman, tell us what you knew about him?

A Mr. Cookman was and is the superintendent of the North Carolina District of the Assemblies of God.

Q All right.

A And that is --

Q He is responsible for all the churches here in this state?

A Every minister and every church in the State of North Carolina that belong to the Assemblies of God.

Q Mr. Dortch, of course, needs no explanation. The jury knows who he is. What about Mr. Lawing?

A Mr. Lawing was a businessman right here in Charlotte who had been with the very development of PTL, from the very beginning, and he was also a businessman.

Q All right. Now, when you first joined the board and you went down for the first time to meet these folks, did you have a conversation with Mr. Dortch wherein he related to you how the board relied on each other?

A Yes.

* * *

[Trial Transcript p. 4998 - Cross exam of Cortese]

* * *

Q Now, did you ever vote a bonus for Mr. Bakker or anybody else that you didn't believe was in the best interest of PTL?

A No, we did not.

Q And again, would you tell the jury why did you pay Jim Bakker all this money?

A Well, we felt he was worth it. When you think in terms of somebody bringing in 20, 30, 40 million a year, a million for him didn't seem out of order or out of proportion.

Q All right. And again, all of the votes for the bonuses were unanimous; correct?

A They were.

Q So that every one of the people on this board here did the same thing you did; correct?

A Yes, they did.

Q By the way, there are three other board members right here. Would you tell the jury when these [4999] three people cam on and what they brought to the board, quickly?

A Yes. In about 1984 Ernie Franzone came on.

Q That is this gentleman right here?

A Yes.

Q All right.

A And he was a specialist and a vice-president of a hotel firm, I believe it was Brock.

Q All right. The other two, please?

A Okay. Rev Ev, as we called her.

Q Rev Ev?

A Rev Ev, Evelyn Carter. We know her as Rev Ev. She is a speaker. She is an author. S[h]e is a person that crosses the continent at least four or five times a year and is very well versed and known.

Q And that gentleman in the corner there, who is he?

A Reverend George.

Q All right. Reverend George is a pastor of a very large Assembly of God in Irving, Texas.

Q Again, these were the people that you voted with and you consulted with on the board; correct?

A Yes, sir.

* * *

[Trial Transcript p. 5003 - Cross exam of Cortese]

* * *

Q All right. Now, during your time on the board, there were financial matters and projects that came before the board. Did you consult with the people on that board who you considered to be financially sophisticated?

A Yes.

Q All right. Did you ever vote on a project that, without consulting with your colleagues on the board?

A No, I did not.

* * *

Q I think you told the jury yesterday that you were a little squeamish about these financial matters, I think that was your word, wasn't it?

A Yes.

Q All right. And when you were squeamish [5004] about these matters, you still spoke to your colleagues on the board, didn't you?

A Yes, I always did.

Q All right. So, you were squeamish because you didn't really have any training or expertise, but you still did your job, didn't you?

A Yes, I did.

Q And you consulted with those gentlemen up there and based on those consultations, you were satisfied?

A I was.

Q All right.

* * *

[Trial Transcript p. 4990 - Cross of Cortese]

* * *

Q Now, with respect to the Lifetime Partnership progra/m, when the presentation was made, was the board advised that this matter had been reviewed by the attorneys?

A Definitely.

* * *

Q Did the board ever approve a program that had not been passed on by the attorneys, to your knowledge?

[4991]

A No, we did not.

Q All right. Now, I want to ask you some specific questions about the Partnership program that have come up during the course of this trial. My first question is this: Did the board ever know that time shares were even an issue in connection with the Lifetime Partnership program?

A No, they did not.

Q Was it an issue ever raised by Mr. Dortch or Mr. Bakker in the board of board of directors?

A I don't think so.

Q Was it raised, ma'am, to your knowledge?

A I don't think so.

Q You don't think so? How about the possibility of securities law violations, was that ever raised by Mr. Dortch or Mr. Bakker?

A I do not recall.

Q All right. Did Mr. Dortch tell you that at anytime, that the PTL attorneys had some reservations about this program?

A Oh, never.

Q Did he ever tell you that Mr. Yorke had some questions about the program?

A No, he did not.

Q Did he ever tell you that Mr. Givens had [4992] some questions about this program?

A He did not.

Q In fact, he told you the opposite, didn't he?

A It was clear.

Q And you believed him, correct?

A Definitely.

Q Now, there were also some questions during the course of this trial and a fair deal of evidence about some IRS questions. Now, let me just ask you this: Did you ever hear the term private inurement in the board meetings?

A I never did, sir.

Q When is the first time you heard that term?

A In this trial.

Q Did you hear it at your deposition?

A Yes.

Q All right. So, it wouldn't have been at this trial. You actually heard the term during the deposition?

A I heard it in Florida.

Q Okay. And is it fair to say that the board never knew about the private inurement issue?

A I never heard it discussed. They did not know it.

Q All right. And you would have expected Mr.

[4993]

Dortch or Mr. Bakker to bring that to your attention if it was an issue?

A Definitely.

* * *

[Trial Transcript p. 4928 - Direct of Cortese]

* * *

Q And you yourself are a Lifetime Partner, aren't you?

A Yes, I am, sir.

* * *

[Trial Transcript p. 5011 - Cross exam of Cortese]

* * *

Q All right. Were you ever told or were you ever asked to consider the possibility of what they call a going concern issue?

A No, sir.

Q All right. Now, did you know that the IRS had issued a report in November 1985 taking a number of positions, one of which was that maybe PTL should lose its tax-exempt status because of private inurement?

A No, sir.

Q Because you never discussed private inurement in the board meetings, did you?

A Never.

Q All right. Did you ever know that the Lifetime Partnerships -- did Bakker or Dortch ever tell you the Lifetime Partnerships had been oversold?

A They did not.

Q All right. Did you ever know that Lifetime Partnership funds were used to pay Mr. Bakker's bonuses?

A No, we did not.

Q In fact, when you voted on those bonuses, did you ever intend for those funds to come from Lifetime Partnership funds?

A No, sir.

* * *

[Trial Transcript p. 4001 - Cross exam of Howlett]

* * *

Q And let's talk about the board. You testified during Mr. Anderson's examination that you felt that Mr. Bakker had de facto control over the PTL. Do you remember that testimony:

A Yes, sir.

Q And you testified that he exercised that control over the board of directors. Do you recall saying that?

A Yes, sir.

[4002]

Q Now, with reference to that testimony, isn't it a fact, sir, that you concluded that Mr. Baker and Mr. Dortch, that Mr. Bakker and Mr. Dortch were very effective at manipulating the board of directors. Isn't that so?

A Yes, sir.

Q And in large part the way they manipulated the board of directors was by controlling the flow of information to the board of directors; correct?

A Yes, sir.

Q And that they would essentially decide what information would be disclosed to the board of directors and conversely, what information the board wouldn't get to see; correct?

A Yes, sir.

Q All right. In that regard, they were able to effectuate the decisions that the board made by disclosing some things and not others; correct?

A Yes, sir.

* * *

Q As to bonuses, isn't it a fact, sir, you [4003] concluded after doing all the examination that you just told us about, that the amounts of many of those bonuses were not approved by the board of directors; correct?

A Yes, sir.

Q You also made other conclusions about the board pertinent to your direct examination in that regard. You concluded, for example, that the minutes of the board of directors were altered subsequent to the time they were initially drafted; is that right?

A Yes, sir.

Q They were altered to the extent, in one instance, of altering the amount of bonus that was supposedly awarded by the board; correct?

A Yes, sir.

Q Mr. Howlett, you testified about the 1985 tax letter that was received from the IRS. Do you recall that testimony?

A Yes, sir.

Q I may not have described it adequately. There was a letter written in November 1985, recommending that the tax-exempt status of PTL be revoked because of private inurement;

correct?

A That's correct.

Q Now, during the course of the examination and the analysis that you did to prepare this report, it is a fact, sir, that you concluded that the board of directors was never shown that report; correct?

A That's correct.

Q And in fact, they never even knew that a recommendation had been made that the IRS revoke PTL's tax-exempt status; correct?

A As far as we could determine.

Q And is it not a fact, sir, in talking to the board and reviewing whatever information was available to you, you concluded that the board of directors wasn't even aware that private inurement was an issue; correct?

A That's correct.

* * *

[Trial Transcript p. 244 - Cross of Nelson]

Q All right. Now, first if you would share with me the title you had out there was vice-president?

A Of World Outreach.

Q Okay. And how many other vice-presidents, just during the timeframe you were there, were there at PTL?

A Sir, there were more than ten. I'm not sure.

Q Okay. Did all have the title of vice-president, followed by of something?

A Yes.

Q Would you relate, and if you would, your position out there for me, sir, where you were with relationship to the following people. First, Mark Bergen.

A Equal to.

* * *

Q Richard Dortch, Sr., because there are two, Sr. and Jr.?

A Yes.

Q All my questions, unless I say otherwise, would be Richard Dortch, Sr.

A Right.

[245]

Q Richard Dortch?

A Sr.?

Q Sr.

A I worked for him.

Q Does that mean you reported directly to him?

A Yes. He was one person I reported to.

Q Is it fair to state that pretty much everybody, except maybe Jim Bakker, reported to him?

A It's fair to state that everybody -- there were several who reported to both.

* * *

[246]

* * *

Q David Taggart?

A David was just a vice-president.

Q Just a vice-president. You were just a vice-president?

A Yes.

Q On that basis, can I direct you to what I have told you I was going to come talk to you about, 1925?

A Uh-huh (affirmative).

Q Paragraph 41, it states, "From my discussion with Mr. Nelson, I determined the following close inner circle of people associated with Jim Bakker and Reverend Richard Dortch, Sr." Then it lists Jim Bakker.

A Right.

Q Am I correct?

A Right.

Q And this is where you made a correction. What is listed as number one, that you have endorsed in this document?

A David Taggart, Bakker's personal valet.

Q Bakker's personal valet. Okay. Was it your understanding, sir, in your dealings with Jim Bakker [247] that you had the opportunity to deal with him directly or was there more frequently than not someone through whom you dealt with Jim Bakker?

A More frequently it was someone through someone.

Q And would David Taggart have been one of those people?

A Yes, he would.

* * *

Q All right. So that I'm clear, you issued an order out there within your authority not to sell any more partnerships?

A That's right.

Q Sir?

A Yes, sir, that's true.

Q Did you understand that to be within your authority to do?

A It is something I did.

[248]

Q Well, you told us you did it. A lot of people do a lot of things. I'm asking you was it your understanding that you had authority to do it?

A No.

Q You didn't have that understanding?

A No.

Q All right.

MR. TOMS: Mr. Nelson, I can't hear you.

THE WITNESS: I thought I had authority. I did not have authority to do that.

BY MR. COTTEN (CONTINUING):

Q You thought you had it, but it turned out you didn't have it?

A That's right.

Q How did you learn you didn't have it?

A I got a call from David Taggart; one from him, and I also talked to Pastor Dortch.

Q So, Pastor Dortch was also involved in this discussion saying "keep on selling"?

A Yes.

Q Now, you said you did have an opportunity to go back and review your testimony that also was under oath; that's correct?

A Yes, sir.

Q And when David Taggart was talking to you [249] about this membership and your particular order, was he telling you, as the question suggested, that he, David Taggart, was upset and keep on selling, or was he conveying a message to you that Jim Bakker was upset and you should keep on selling?

A He was conveying a message.

Q Thank you. And that was confirmed by Reverend Dortch or Pastor Dortch?

A Yes, sir.

Q Now going back to the time-share discussion, can you fix that at a point in time for me as to when this question came up that somehow prompted David Taggart to share with us his opinion?

A Approximately three months after employment, around November 1985.

Q And was this in response to a question posed by you to him?

A Yes, it was.

Q Was it posed to him individually or to him to be conveyed as your question to Jim Bakker?

A Mine to be conveyed to Pastor Bakker.

* * *

[Trial Transcript p. 3985 - Cross exam of Howlett]

* * *

Q Now, at the time, sir, when you went out there in '79, even by correspondence, James Bakker was the gentleman in control; is that correct?

A Sir, repeat that.

Q In 1979, when you first encountered PTL, James Bakker was the gentleman you determined to be in control?

A Correct, yes, sir.

Q And that never changed, in your view, even when you returned in '87, that as a control person, James Bakker was in control?

A He was not in control at the time I returned in '87, but he controlled the facts and circumstances of all the events up until March of '87.

Q All right. So, in March, then, of '87, he was a control person, in your view?

A Yes, sir.

Q And I believe you indicated earlier in a [3986] prior proceeding that Richard Dortch was also a control person?

A Yes, sir.

Q And you also indicated that David Taggart was not a control person?

A Yes, sir.

* * *

[Trial Transcript p. 2129 - Cross exam of Dortch]

* * *

Q Did David Taggart participate in any of the promotions, whether we call it, again, sale, investment, gifts of life gift, of Lifetime Partnerships?

A Not to my knowledge.

* * *

[Trial Transcript p. 37]

* * *

We are suing the auditors, Laventhol & Horwath, Deloitte Haskins & Sells, on the basis that they aided and abetted the management fraud of Jim Bakker and David Taggart. That's the case.

In order to sustain our burden of proof on the aiding and abetting, we have to prove that the auditors had knowledge of the management fraud, and we will do it. And that they substantially assisted the management of fraud, and we will do it.

* * *

[Trial transcript p. 80]

* * *

So, in summary, we are going to show in this case the management fraud of Jim Bakker and David Taggart, in reference -- strike that -- in reference to Jim Bakker, was the same management fraud that he was convicted of in October of 1989. Our evidence will show that the auditors aided and abetted in seven separate areas. Our evidence will show in the absence of that aiding and abetting, we wouldn't be here.

* * *

[Trial Transcript p. 76]

* * *

1985, a Debra Grow, for Laventhol & Horwath, had a discussion with Mr. Spears. She said she did not know any reason, didn't know any reason why a going concern qualification should not be set forth. She took notes of why she thought that. I asked her for those notes. They are not there. Those are your issues to decide. The point is, two auditing firms, in the first instance, Deloitte Haskins & Sells, and in the second instance, Laventhol & Horwath, through Debra Grow, thought there should be a going concern qualification, and they were right, because PTL went into bankruptcy on June of 1987. And our evidence will show that just based upon -- forgetting the fact that the time share should have been recorded; the refund, as a current liability, the oversales should have been recorded as a current liability, and all of those things, just based upon the

financial statements as set forth by Deloitte Haskins & Sells and Laventhol & Horwath, a going concern qualification was necessary

Next, in reference to -- and I'm getting close. I better, because the Judge said it's war -- in reference to security -- I neglected to say thanks when I started

[77]

* * *

In reference to security, our evidence will show this was a security. Why was it a security? Because it meets the requirements of being a security. It was an investment in an enterprise, and it was shown to be an appreciation of the value. We will show that to you through some video tapes. Another indicia of a security is the fact it is transferable, and this was, and it is refundable, and it was. So, our evidence will show it is a security as well, though they didn't comply with the securities laws.

Then in reference to reliance. In this case it is only necessary for the plaintiffs to prove in reference to the subject matter of reliance, that they relied upon something that PTL said or something that PTL wrote. In reference to all of our clients, all of the class, the evidence will show that they listened to the TV representations or they saw the brochures, and because of that, they made their investment. It is true that our clients, most of them, did not see the financial statements; but it is also true that our evidence will show this, that the auditing report went from the [78] auditors to management; management would then distribute them to the newspapers, to ECFA, and to the public. And if there was anything that was -- for example, oversales, for example, private inurement, for example, those other things that should have been in the financial statements, and the newspapers got hold of that, you can understand what would happen. It would become public information.

Now, let me just, in reference to Laventhol & Horwath, I can only give you a conclusion. Laventhol & Horwath, as a result of the way they amortized deferred revenue, they applied improper accounting standards, improper auditing standards, and created $46

million of income when it wasn't justified.

The second thing they did, they said in their financial statements, May 31, '86, that although PTL took in $10 million after the year's end on the Tower sales, it wasn't taken into consideration in the financial statements for '86, and they are wrong. In fact, it was. It was what is known as an off-the-book, off-the-financial-statement transaction. One of the experts said when that happens, it's very suspect.

* * *

[Trial Transcript p 5167]

* * *

MR. BIRD: Your Honor, in this case I think our evidence has shown that none of this could have happened without the auditors. It was only their aiding and abetting that made it possible, Deloitte's and Laventhol's, that made it possible for Jim Bakker to oversell the Lifetime Partnerships grossly without being checked, to receive $8 million in compensation without being checked. In fact, there were checks written by the auditors to violate time-share laws, to operate as an insolvent organization and so forth.

* * *

[5168]

* * *

Under RICO we have claimed that each accounting firm is guilty of aiding and abetting.

* * *

[5174]

* * *

Then Deloitte was there in a meeting, and at that meeting, January 16, '84, Yorke and Ethridge said they were very concerned with Real Estate Commission seeing it as a time-share package, Real Estate Commission is what implements the Time-Share Statute, and that meeting was with Bob Brown of Deloitte.

Then there was another meeting two days later, when there was a meeting at Deloitte in connection with the overall

consideration of the Heritage Grand solicitation, the obvious legal issues involved are, one, time share; two, securities.

Deloitte had knowledge four months before it chose to cover it up, to hide it, to aid and abet the time-share violations.

These are just highlights of a large amount of evidence that this Court has seen in the last [5175] couple of weeks that involve Deloitte's knowledge that crucial ingredient of aiding and abetting, along with substantial assistance, writing the checks, hiding it, not putting anything in the auditor's report, saying, certifying the financial statement that had no reference, writing the footnotes without any reference. In many cases this has been the sort of thing that has been ample evidence of aiding and abetting, RICO, securities or other fraud.

Deloitte ended by referring to reliance, and I will refer to that as well very briefly, because I know my time is winding down. Deloitte referred to a reliance requirement, but Your Honor has already ruled that this is not a reliance requirement for aiding and abetting a RICO violation. That is in an order that is in the docket number 648 at numbered item ten. Reliance is not an element of aiding and abetting for RICO. The same is true for securities. The securities test for aiding and abetting has never ever been stated by any Court of Appeals to include a reliance element, and for securities law generally, there is no requirement for positive proof of reliance in an omission case such as this. But if there were any requirement for reliance, that requirement is met, because in this case we have a number of sources of financial information.

[5176]

THE COURT: I don't think you need to go any further on that.

MR. BIRD: Thank you, Your Honor. We just suggest aiding and abetting is amply demonstrated. It is a jury issue, ready to go to the jury.

* * *

[Trial Transcript p. 7664]

* * *

MR. COTTEN: We will put it in as an instruction, thank you, Your Honor.

THE COURT: Whether you put it in as an instruction depends on whether it ought to be given as an instruction. I can't predict what the instructions will be or what the facts will be.

Okay, anything further about the issues?

Mr. Bird: No, Your Honor.

* * *

[Trial Transcript p. 7479 - Defense counsel Phillips during directed verdict motion]

* * *

Deloitte is being charged, as I understand it now, the primary fraud claims are gone against Deloitte. They don't say that Deloitte engaged in a fraud, they say that Deloitte aided and abetted fraud, fraud by Mr. Bakker.

* * *

[Trial Transcript p. 7487 - Plaintiffs' counsel Bird during directed verdict motion]

* * *

MR. BIRD: We don't want to make Mr. Phillips too happy today, Your Honor. In response to what he said, plaintiffs would suggest that Mr. Bakker's fraud was not possible without Deloitte Haskins & Sells aiding and abetting. Mr. Bakker could never have gotten away with it without what Deloitte knew of and did.

* * *

[7492]

* * *

While we believe we have proved fraud, to simplify the case we have proposed jury instructions that only charge conspiracy and aiding and abetting of the fraud by Deloitte, and we feel the evidence is abundant to let it go to the jury.

* * *

[Trial Transcript p. 7931]

* * *

MR. BIRD: Your Honor, Line 10, and a couple other places, there is a reference to defendants committing two or more racketeering activities. I think that comes from the earlier version of instructions when we were arguing primary liability.

THE COURT: What are you proposing to do?

MR. BIRD: Replace defendants with "Bakker" four times on that page.

THE COURT: Is he the only one as to which there is --

MR. BIRD: For primary violations, yes.

* * *

[Trial Transcript p. 8047]

* * *

MR. WALLAS: Your Honor, it is my understanding that after you instruct the jury, you will ask us if we have any exceptions or questions that we need to raise, and that is the appropriate time to lodge any other exceptions we have to the instructions.

THE COURT: Go by the rules, whatever the Federal Rules provide.

* * *

[8276]

MR. BIRD: A motion to delete the terms "crimes and criminal" in the RICO instructions, Federal and State.

THE COURT: Why?

MR. BIRD: Because civil RICO does not require conviction of crimes or --

THE COURT: Have I already read the [8277] statutes?

MR. BIRD: Yes, sir.

THE COURT: To the jury.

MR. BIRD: You have.

THE COURT: And I read the statute the way the, the statutes the way they are written.

MR. BIRD: Yes, sir.

THE COURT: Why should I go back and do something different about that?

MR. BIRD: An additional motion is in connection with North Carolina RICO, where the reasonable doubt standard was applied to the aiding and abetting claims, and we would request whether the reasonable doubt standard ought to apply to aiding and abetting claims.

THE COURT: If you are making a motion, tell me what it is. Is this a motion to change an instruction previously given?

MR. BIRD: Yes, sir.

* * *

[8279]

* * *

MR. BIRD: Our motion was to reinstruct based on eliminating the reasonable doubt standard from the aiding and abetting instructions under North Carolina RICO.

* * *

[8283]

* * *

MR. BIRD: Your Honor, our final motion is in connection with Federal RICO instructions. Moving for a redefinition of acquiring an interest.

* * *

MR. BIRD: We objected earlier to this [8284] and our motion is just to redefine it. Your Honor ruled against us in saying that it is not sufficient to have an employment relationship and our motion is to go back to the way we had proposed, saying that employment relationship is sufficient to acquire an interest.

* * *

MR. SINGER: Your Honor, the instruction you read was a quotation from Federal jury instruction 84, 1981 edition. It is out of the modern Federal jury instructions pattern.

THE COURT: It sounds all right to me. I thought it was all right yesterday. Are you citing any authority that it is still isn't all right?

MR. BIRD: Your Honor, I'm not prepared to at this time.

THE COURT: Neither am I.

MR. SINGER: Again, Your Honor, you have already ruled on this particular motion previously.

THE COURT: Any more problems?

MR. BIRD: No, sir, Your Honor.

* * *

THE COURT: Mr. Bird, as I understand it, I have ruled against you on all three points?

* * *

[7946]

* * *

THE COURT: Let's talk about the substance of what you want before you start citing cases. What is it you want me to do?

MR. SINGER: Your Honor, I would like an instruction that civil RICO requires --

THE COURT: On this page, 59?

MR. SINGER: Yes, sir. It would go either behind 59 or wherever the Court thinks is appropriate. I would request this instruction that was just handed to Your Honor, which is Page 76 of our proposed jury instructions, and it instructs the jury that a finding of criminal intent on the part of the defendants is required for civil RICO liability, and, Your Honor, we have cited some cases within the Fourth Circuit that hold that. We haven't cited a Fourth Circuit case that in dicta mentions that. I can't tell the Court the Fourth

Circuit has held that. That wouldn't be accurate, but the Fourth Circuit has certainly intimated that is what it believed to be the case.

MR. BIRD: Your Honor, plaintiffs object to that, but would not object to using the exact language out of the Fourth Circuit decision. It would be on point.

[7947]

THE COURT: I don't have the decision before me, but if you will get it, I'll be glad to give it. The substance of it is on Page 58 of the instructions.

MR. SINGER: Your Honor, the language of the Fourth Circuit case --

THE COURT: You write it and hand it up so I can put it here if I decide to.

MR. SINGER: Yes, Your Honor.

THE COURT: You want that to go in where, on Page 59?

MR. SINGER: Your Honor, I think it would be appropriate following Page 59.

THE COURT: Okay. Do you have the text of it there?

MR. SINGER: Yes.

THE COURT: I'll have to read this to know what it means. I'll just put these papers in my copy of the instructions, at Page 59.

MR. SINGER: Thank you, Your Honor. I apologize for handing up a marked-up copy. That is the only one we had.

THE COURT: Wait a minute. My lawyer suggests we just add the word "criminal" on Page 58, about ten lines from the bottom, so the second would be, [7948] defendant with specific criminal intent.

MR. SINGER: Your Honor, that would be appropriate.

MR. WALLAS: What page are you talking about?

THE COURT: Page 58 of the instructions, on Line 16, add the word criminal after the last "specific".

MR. WALLAS: We have added that, Your Honor.

MR. SINGER: Thank you, Your Honor.

MR. BIRD: A small typographical error on Page 62.

THE COURT: Does it affect the pronunciation of the word?

MR. BIRD: No, sir. Really the sense of the phrase, line, Page 62, Line 17, I believe the word "were" ought to be "with."

THE COURT: "With"?

MR. BIRD: Yes, sir.

THE COURT: All right.

MS. COLLINS: On Page 60, lines --

THE COURT: It has run on you, we have already passed Page 60.

MS. COLLINS: You're fast. Lines 5 [7949] through 7, the sentence that says, we object to the sentence that says, "Conspiracy is a kind of partnership to violate RICO, in which the defendant becomes the agent -- in which a member becomes the agent of every other member."

MR. BIRD: Your Honor, that is straight out of Devitt, Section 27.704, and we would argue it is entirely appropriate. In fact, it is probably a much higher standard than the plaintiffs need to prove.

MS. COLLINS: It is giving an example of an inference, which is just totally unfair in this case.

THE COURT: It may be unfair, but is it the law?

MR. BIRD: Judge Devitt thinks so.

THE COURT: I'm not sure it is unfair. I think it's the law.

MS. COLLINS: Just note my objection there.

THE COURT: All right. Where are we now?

MS. COLLINS: On Page 62, Line 18.

THE COURT: I want to go through these instructions page by page.

* * *

[Trial Transcript p. 8092 - the Court's jury instruction]

* * *

Because the above-noted racketeering activities are separate criminal offenses under Federal law, I will instruct you separately as to the elements of each alleged racketeering activity.

About the underlying predicate offenses, mail fraud. The mail fraud statute, Section 1341 of Title 18, United States Code, provides in pertinent part, the following.

Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, for the purpose of executing such scheme or artifice, or attempting to do so, places in a Post Office or authorized depository for mail, any matter or thing, whatever, to be sent or delivered by the postal service, shall be liable under the offense against the laws of the United States.

In order to establish that mail fraud has been committed for purposes of this case, plaintiffs must show by a preponderance of the evidence that....

* * *

[8096]

* * *

In order to establish that wire fraud has been committed for purposes of this case, plaintiffs must show by a preponderance of the evidence that, first, some person or persons willfully and knowingly and with the specific intent to defraud devised a scheme or artifice to defraud, or for obtaining money or property by means of false pretenses, representations or promises. And plaintiffs must similarly show, second, some person or persons transmitted writings, signs, signals, pictures or sounds or caused them to be transmitted by interstate television and/or by telephone for the purpose of executing the scheme to defraud. Each separate use of interstate wires in

furtherance of a scheme to defraud constitutes a separate racketeering activity.

Wire fraud as a racketeering activity may be established without proof that one or more of the defendants personally did every avt constituting wire fraud. The law recognizes that ordinarily anything a person can do for himself may also be accomplished by him through direction of another person as his agent, or [8097] by acting in concert with or under the direction of another person or persons in a joint effort.

Section 1962D, conduct. Plaintiffs have alleged that defendant Bakker, Deloitte and Taggart have committed a violation of RICO, Section 1962D. That section of the RICO Statute provides that it shall be unlawful for any person to conspire to violate any of the provisions of subsection A, B, or C of this section. To show that a defendant has violated Section 1962D, plaintiffs must prove each of the following elements by a preponderance of the evidence.

First, that there was a violation of any of Sections 1962A, B, C. Second, that a defendant with criminal intent conspired to violate any of such sections 1962A, B, or C.

* * *

[8100]

* * *

On the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.

Before the jury can find that a defendant has become a member of a conspiracy, the evidence must show by a preponderance that the conspiracy was knowingly formed and that the defendant willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. To act or participate willfully means to act or participate voluntarily and intentionally and with specific intent to do something the law forbids or with specific intent to fail to do something the law requires to be

done. That is to say, to act or participate in a bad purpose either to disobey or to disregard the law.

An omission or a failure to act is willfully done if done voluntarily and intentionally and with the specific intent to fail to do something the law requires to be done. That is to say, with bad purpose either to disobey or to disregard the law. ...

* * *

[8109]

* * *

The next topic aiding and abetting. Title 18 of the U.S. Code, Section 2, provides that an aider and abetter is punishable as a principal as follows.

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. In order to aid and abet another to commit an offense, it is necessary that the accused willfully associate himself in some way with the RICO enterprise and pattern of racketeering acts and willfully participate in it as he would in something he wishes to bring about. That is to say, that he willfully seeks by some act or omission of his to make the RICO enterprise and pattern of racketeering acts succeed.

An act or omission is willfully done if done voluntarily or intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do to something the law requires to be done. That is to say with a bad purpose either to disobey or to disregard the law.

* * *

[8107]

* * *

The purpose of adding the word knowingly is to be sure no one will be found liable under RICO because of an omission or failure to act due to mistake or accident or other innocent reason.

As I said a moment ago, with respect to an offense such as charged in this case, specific intent must be proved by a preponderance of evidence before there can be liability under RICO.

* * *

[8081]

* * *

Racketeering activity includes the predicate acts of mail fraud and wire fraud, the offenses at issue in the present case. To succeed in an action, the plaintiff must prove that he was injured in his business or in his property. White collar businesses as well as organized crime racketeers are liable if they violate RICO. The RICO Act is not limited to organized crime, but extend[s] beyond organized crime...outsiders as well as insiders can be liable....The substantive prohibitions of RICO apply to insiders and outsiders, those merely associated with an enterprise, [8082] who participate directly and indirectly in the enterprise's affairs... .

* * *

The plaintiffs have alleged that defendant Jim Bakker has committed, and that Deloitte Haskins & Sells and David Taggart have aided and abetted and conspired in violations of the RICO statute, Racketeering Influenced and Corrupt Organizations Act.

Section 1962A of Title 18 of the Untied States Code, RICO Statute, provides that it shall be unlawful for any person who has received any income derived directly or indirectly from a pattern of racketeering activity in which such person has participated as a principal within the meaning of Section 2, Title 18,, U.S. Code, used directly or indirectly any part of such income in acquisition of any interest in an enterprise which is engaged in, or the activities of which affect interstate or foreign commerce. To show that a defendant has violated Section 1962A, that is the one I just read, plaintiffs must prove, must prove each of the following elements by a preponderance of the evidence.

* * *

[8083]

* * *

Plaintiffs must prove by a preponderance, that means greater weight, of the evidence that Bakker received income from a pattern of racketeering activity. I have already told you what the plaintiffs must prove to show a pattern of racketeering activity by Bakker.

* * *

[8084]

* * *

Plaintiffs have alleged that defendant Bakker has committed and that Deloitte Haskins & Sells and David Taggart have aided and abetted and conspired in violations of RICO Section 1962B. Section 1962B of Title 18 of the U.S. Code, the RICO Statute, provides that it shall be unlawful for any person through a pattern of racketeering activity to acquire or maintain directly or indirectly any interest in any enterprise which is engaged in or the activities of which affect interstate or foreign commerce. To show that the defendant violated Section 1962B, the plaintiffs must prove each of the following elements by a preponderance of the evidence.

* * *

Plaintiffs allege that the same defendants violated Section 1962C. Section 1962C of Title 18 [8085] of the U.S. Code, RICO Statute, provides that it shall be unlawful for any person employed by or associated with any enterprise engaged in or the activities of which affects interstate or foreign commerce, to conduct or participate directly or indirectly int he conduct of such enterprise's affairs through a pattern of racketeering activity. In order to show the defendant has violated Section 1962C, plaintiffs must prove each of the following elements by a preponderance of the evidence. Preponderance means the greater weight of the evidence.

* * *

My instruction regarding the enterprise element and the interstate commerce elements are the same for each section of the RICO Act. As previously stated, it is the plaintiffs' obligation to prove by a preponderance of the evidence ...[8086] and that it was

involved in interstate commerce. A person may be an enterprise for the purposes of Section 1962A only.

If you find that the alleged enterprise existed and was involved in interstate commerce, and that Bakker engaged in a pattern of racketeering activity, you must then turn to the final element of the RICO claim.

The final element that plaintiffs must prove by the greater weight of the evidence in order to prove a violation of RICO sections A and B is that through a pattern of racketeering activity defendant acquired or maintained an interest in or control of the enterprise. Plaintiffs allege that Bakker acquired or maintained an interest in PTL through a pattern of racketeering activity. In order for you to find that plaintiffs have established this element, you must find that Bakker, through a pattern of racketeering, gained actual day to day involvement in the management and operation of PTL. If plaintiffs did not prove by the greater weight of the evidence that Bakker was involved in the day-to-day management or operation of PTL, it fails to satisfy this element of this Section 1962 claim.

* * *

[8090]

As I have already said, each prohibited activity under Section 1968 and 1962 requires that you find that Bakker engaged in a pattern of racketeering activity. You must initially determine whether the plaintiffs have proved by a preponderance of the evidence that Bakker committed two or more racketeering activities or predicate acts.

* * *

[8099]

* * *

What the evidence must show by a preponderance of the evidence, in order to establish proof that a conspiracy existed, is that the members in some way or manner or through some contrivance, positively or tacitly, that means without expressed agreement, in a positive way, tacit about some kind of common understanding, came

to a mutual understanding to try to accomplish a common and unlawful plan.

* * *

[8104]

* * *

If you conclude that the conspiracy did exist, you can, you should next determine whether or not each defendant willfully became a member of the conspiracy.

If it appears by a preponderance of the evidence that the conspiracy alleged was willfully formed and that a defendant willfully became a member of the conspiracy, either at its beginning or afterwards, and that thereafter one or more of the conspirators knowingly committed two or more of the acts of racketeering activity charged in furtherance, in furtherance of some object or purpose of the conspiracy, then there may be liability even though the conspirators may not have succeeded in accomplishing their common object or purpose, and in fact, may have failed in doing so.

* * *

[8107]

* * *

As I said a moment ago, with respect to an offense such as charged in this case, specific intent must be proved by a preponderance of evidence before there can be liability under RICO.

There must be more than one conspirator. The plaintiffs complaint charges among defendant Bakker, Deloitte and Taggart. A person cannot conspire with him, and therefore, you cannot find any of the defendant liable for conspiracy unless you find beyond a preponderance of the evidence that he participated in a conspiracy as charged with at least one other person, whether that person is a defendant or not.

* * *

[8110]

* * *

You, of course, may not find any defendant liable unless you find by a preponderance of the evidence that every element of the offense as defined in these instructions was committed by some person or persons, and that the particular defendant aided and abetted in its commission.

Plaintiffs assert that Deloitte and Taggart aided and abetted the various alleged RICO violations by Bakker I have just discussed. Deloitte and Taggart deny these allegations.

In order to find Taggart and Deloitte liable for aiding and abetting a RICO violation by Bakker, plaintiffs must prove by a preponderance of the evidence each of the following four elements as to each person. Number one, that Bakker committed a primary violation of RICO.

Two, that Taggart and Deloitte had actual knowledge of the primary violation and their alleged roles in furthering that violation.

Three, that Taggart and Deloitte knowingly and intentionally gave substantial assistance to the primary violation.

And four, that Taggart's and Deloitte's aiding and abetting of a primary violation of RICO actually and approximately caused harm to plaintiffs.

* * *

[8016]

* * *

MR. SINGER: I would like to bring you some happy news. You instructed Mr. Bird and myself to come to some resolutions during this gross negligence interlude, and we have, and Mr. Bird will report on one of them and I'll report on another.

MR. BIRD: Your Honor, the first one was you instructed us to come to agreement on North Carolina RICO, and we have discussed that with the parties involved.

* * *

[8017]

* * *

MR. BIRD: Pages 97 to 101, and if I may, I'll simply hand up a list of the changes that we have all agreed on, that will shorten it and accomplish what we were talking about. That will save having to talk it through right now, if that is all right, Your Honor.

THE COURT: 101?

MR. BIRD: Yes, sir, 97 to 101.

THE COURT: All right, since those changes have been agreed to by all the parties, they will be made.

MR. BIRD: Thank you, Your Honor.

THE COURT: May be made.

MR. BIRD: Mr. Singer has the other half of our joint agreement here to report on.

MR SINGER: Your Honor, on Page 115, 23, together with Mr. Toms, have agreed on a number of changes. If is all right with the Court, Your Honor, on Line 1, it might be easier for me to read them out. There are not many.

THE COURT: 115?

MR. SINGER: Yes, sir.

THE COURT: Who did you say had agreed on this?

MR. SINGER: Mr. Bird for the plaintiffs, [8018] Mr. Toms for Mr. Bakker, and myself in behalf of Deloitte, and we are the only two defendants involved in this --

THE COURT: What line?

MR. SINGER: Line 1, Your Honor. We would strike the words, "the defendant," and put in the word, "Bakker." This is a charge on the primary violation. Mr. Bakker is the only alleged primary violator.

The next change would be on Line 7, and we would strike from the words "A representation positively made by one who ought," and in place of that, we would insert, "A positive representation by Bakker, when --"

THE COURT: A positive representation made by Bakker?

MR. SINGER: Yes, sir. When, and then continuing with the printed words, under the existing circumstances.

THE COURT: Are you striking out the words, "one who ought"?

MR. SINGER: Yes, sir. We are going to have it inserted again in a moment. Then we would continue --

* * *

[8127]

* * *

I charge you that to find Bakker liable for embezzlement, plaintiffs must prove three things beyond a reasonable doubt, not just by a preponderance of the evidence. Those three things are these.

First, that defendant was president of PTL.

Second, that while acting as PTL's president, Bakker rightfully received Lifetime Partner monies.

Third, that defendant Bakker fraudulently and dishonestly and willfully and corruptly used Lifetime Partner monies for some purpose other than that for which he received them.

If you find from the evidence beyond a reasonable doubt that between January 7, 1984 and April 17, 1987, defendant Bakker rightfully received Lifetime Partnership monies as president of PTL, and that he fraudulently and dishonestly and willfully and corruptly used them for some purpose other than that for which he received them, it is your duty to return a verdict of liability for embezzlement against defendant Bakker.

* * *

[8129]

* * *

This means, for example, Bakker may not be found to have violated the North Carolina RICO statute, if some of you believe only racketeering acts of mail fraud are committed by Bakker, and others thing only acts of embezzlement were committed by Bakker. All of you must agree which specific acts were committed by Bakker. The State criminal law predicate racketeering act alleged by plaintiffs

under Section 14-92 is embezzlement by Bakker as an officer of a religious organization. Plaintiffs also assert that Taggart and Deloitte aided and abetted and conspired in Bakker's crime.

Bakker denies he committed any such crime. Taggart and Deloitte deny they aided and abetted or conspired in any such crime.

Continuing on with the North Carolina RICO, a matter of aiding and abetting an embezzlement. Plaintiffs have alleged that Taggart and Deloitte aided and abetted an embezzlement by Bakker. Taggart and Deloitte deny it. In order to find Taggart and Deloitte liable for aiding and abetting embezzlement, plaintiffs must have proved beyond a reasonable doubt the following elements.

* * *

[8276]

MR. BIRD: We just state for the record a couple instructions, exceptions that Your Honor has already ruled on. The first is the use of the language crimes and criminal in regard to Federal and state RICO.

The second is the reasonable doubt standard as applied to --

THE COURT: Are you making a motion or a request with respect to that first statement you just made?

MR. BIRD: Objections for the record to particular portions of the instructions, Your Honor, and that is the reference --

THE COURT: I'm not interested in objections for the record. I want to know what you are objecting to.

MR. BIRD: All right.

THE COURT: Tell me what the first proposition is.

MR. BIRD: A motion to delete the terms "crimes and criminal" in the RICO instructions, Federal and State.

THE COURT: Why:

MR. BIRD: Because civil RICO does not require conviction of crimes or --

THE COURT: Have I already read the [8277] statutes?

MR. BIRD: Yes, sir.

THE COURT: To the jury.

MR. BIRD: You have.

THE COURT: And I read the statute the way the, the statutes the way they are written.

MR. BIRD: Yes, sir.

THE COURT: Why should I go back and do something different about that?

MR. BIRD: An additional motion is in connection with North Carolina RICO, where the reasonable doube standard was applied to the aiding and abetting claims, and we would request whether the reasonable doubt standard ought to apply to aiding and abetting claims.

THE COURT: If you are making a motion, tell me what it is. Is this a motion to change an instruction previously given?

MR. BIRD: Yes, sir.

THE COURT: Where is the instruction you are challenging?

MR. BIRD: In the originally paginated instructions, Pages 100 to 102.

MR. SINGER: Your Honor, if I might --

THE COURT: Just wait a minute until I [8278] find what we are talking about. 102 is blank except for a couple irrelevant sentences up at the top.

MR. BIRD: 100 to 102, Your Honor. This would be of the instructions as originally paginated.

THE COURT: I'm looking at 100. Show me on 100 what it is you are talking about.

MR. BIRD: If I may, I will just hand up the original instruction.

THE COURT: Will you please tell me where to look for the instruction on Page 100 or 102? Well, that is another set of page numbers. Do you have some information about what page of the original transcript these excerpts are taken from?

MR. BIRD: No, I don't. I am not sure that I have the original transcript.

THE COURT: When you find them, I'll refer to that, but please find it so I can look at it in the original brief.

MR. BIRD: Yes, sir. Our next to last position --

THE COURT: Wait just a moment. It is apparently so far away I'm not going to try to find it now.

MR. BIRD: Yes, sir.

* * *

[8279]

THE COURT: This is North Carolina RICO, embezzlement, aiding and abetting.

MR. BIRD: Yes, sir.

THE COURT: Page 94, Okay. Go ahead.

MR. BIRD: Our motion was to reinstruct based on eliminating the reasonable doubt standard from the aiding and abetting instrucitons under North Carolina RICO.

* * *

THE COURT: What is your basis for that?

MR. BIRD: The North Carolina RICO is civil RICO, not requiring mens rea under the statute, and not expressly requiring the reasonable doubt standard. We conceded that it applied to the predicate act under North Carolina general statutes, Section 14-92, but not that it would apply to aiding and abetting under North Carolina RICO.

[8280]

THE COURT: What do the cases hold on that?

MR. BIRD: There are no cases on the merits under North Carolina RICO. State cases involving civil aiding and abetting do not involve a reasonable doubt standard.

THE COURT: Well, you say do not involve. Do they have a discussion of reasonable doubt standard?

MR. BIRD: Not civil aiding and abetting, but none described North Carolina RICO.

MR. SINGER: Your Honor, if I might respond.

THE COURT: I have not finished. The first question, are the instructions as given, the instructions that were presented to me for delivery to the jury?

MR. BIRD: Yes, sir, I believe so.

THE COURT: Did I read them before counsel had received and read the same instructions?

MR. BIRD: We had received that, Your Honor. We are taking exception to that particular point in the instructions.

THE COURT: Was it the law on the subject as you see it?

MR. SINGER: Your Honor --

[8281]

THE COURT: Not a contention, but what's the law?

MR. SINGER: Not a contention, Your Honor. I might point out you have already ruled on this. The law is that the plaintiffs proposed a reasonable doubt standard as to the primary violation to use a lesser standard for secondary liability would be to subject people further away from the supposed predicate act and less involved to an easier standard of liability.

THE COURT: What is the law on it, I asked you?

MR. SINGER: Your Honor, there has never been a case under North Carolina RICO, but in other context of aiding and abetting, the standard applied to the secondary parties is always equal to or higher than the primary violator, for the reason that a secondary party is farther away from the alletged wrong and is less culpable in terms of its proximity to the wrong.

What the plaintiffs would have you do is hold Mr. Bakker to a standard which is higher than the standard, or would have an easier -- Mr. Bakker would have a better position on this claim as the primary violator, then Mr. Taggart and Deloitte would have as secondary violators, which is the converse of aiding and [8282] abetting law in the civil context. Plaintiffs agree to the reasonable doubt standard as to Mr. Bakker. Therefore, as a matter of logic in

the areas of aiding and abetting under other civil context, they can do no less as to secondary parties.

Your Honor has ruled on this. Mr. Bird has made his argument before, and you denied his motion at the earlier time. Mr. Bird is simply doing what I did earlier, Your Honor, which is noting objections to the instructions given, which have been noted before, because Rule 51 requires we do so to preserve our exceptions.

THE COURT: I think I'll leave it the way it was.

MR. BIRD: My final motion, Your Honor, is for different instruction on the definition of acquiring --

THE COURT: Let me go back to this reference to crimes an criminal. What page was that?

MR. BIRD: In the original instructions, Page 45, Line 19, I believe, and other places. Basically, it occurred throughout the original RICO instructions, and I just handed up Page 45, Line 19.

THE COURT: I have that same feeling of deja vu. I deny the motion.

[8283]

MR. BIRD: Your Honor, our final motion is in connection with Federal RICO instructions. Moving for a redefinition of acquiring an interest.

THE COURT: Where can I find it in the transcript?

MR. BIRD: In the original instructions, Page 33, Lines 23 to 25, which were given in the form I have just handed up on those, on those lines.

THE COURT: Well, are they the same pages?

MR. BIRD: Lines 23 to 25.

THE COURT: I can't find. I need to find the page first. You are lucky, I think these pages are the same. they are the same, I believe.

All right, Page 33, line what?

MR. BIRD: 23 to 25 on the first version, Your Honor.

THE COURT: How does that paragraph begin?

MR. BIRD: I'm afraid I handed up my only copy, but it has a reference to acquiring an interest in an enterprise.

THE COURT: All right. What is wrong with that sentence?

MR. BIRD: We objected earlier to this [8284] and our motion is just to redefine it. Your Honor ruled against us in saying that it is not sufficient to have an employmnent relationship and our motion is to go back to the way we had proposed, saying that employment relationship is sufficient to acquire an interest.

THE COURT: What's the law on that subject?

MR. SINGER: Your Honor, the instruction you read was a quotation from Federal jury instruciton 84, 1981 edition. It is out of the modern Federal jury instructions pattern.

THE COURT: It sounds all right to me. I thought it was all right yesterday. Are you citing any authority that it is still isn't all right?

MR. BIRD: Your Honor, I'm not prepared to at this time.

THE COURT: Neither am I.

MR. SINGER: Again, Your Honor, you have already ruled on this particular motion previously.

THE COURT: Any more problems?

MR. BIRD: No, sir, Your Honor.

MR. SINGER: Your Honor, you had held the --

THE COURT: Mr. Bird, as I understand it, I have ruled against you on all three points?

* * *

[8086]

The final element that plaintiffs must prove by the greater weight of the evidence in order to prove a violation of RICO sections A and B is that through a pattern of racketeering activity defendant acquired or maintained an interest in or control of the enterprise. Plaintiffs allege that Bakker acquired or maintained an interest in

PTL through a pattern of racketeering activity. In order for you to find that plaintiffs have established this element, you must find that Bakker, through a pattern of racketeering, gained actual day to day involvement in the management and operation of PTL. If plaintiffs did not prove by the greater weight of the evidence that Bakker was involved in the day-to-day management or operation of PTL, it fails to satisfy this element of this Section 1962 claim.

* * *

[8140]

* * *

I just described to you the statute of limitations for the South Carolina Time-Share Act. In a case like this one, the time placed upon the plaintiffs began to run when the plaintiffs first knew or by the exercise of reasonable care should have known that the [8141] alleged fraud had occurred in connection with the purchase of Lifetime Partnerships. In this instance, the applicable limitation period is three years. Defendants claim suit is barred because plaintiffs knew or by the exercise of care should have known more than three years before the commencement of this suit that the alleged fraud occurred in connection with the purchases of the Lifetime Partnerships.

As I have said before, this suit was commenced on November 17, 1987. Thus, if plaintiffs knew or by the exercise of reasonable care should have known by November 6, 1984 -- November 16, 1984, that the fraud had occurred, you must find for the defendant on the plaintiffs' claim under the South Carolina Time-Share Act.

* * *

[8022]

* * *

MR. SINGER: Your Honor, I would request that right after Page 119, which is the end of the common law fraud instructions, that we insert a two-page instruciton exactly like your existing Pages 111 and 112, with the words time share marked out

and common law fraud marked in. It's the same period, three years. I don't believe there is any disagreement about that? Three-year statute of limitation.

MR. BIRD: No objection.

* * *

[8264]

* * *

MR. WALLAS: Your Honor, the second one is our contention that the instruction that you gave on the time-share and common law fraud, North Carolina [8265] common law fraud was misleading because it did not discuss appropriately the equitable tolling doctrine, and that is that, if -- specially when you are considering fraud, as I understand the law, plaintiffs are not, the statute is tolled in an equitable manner until such time as plaintiffs knew or should have known that they were being victims of fraud or a fraud was be being perpetrated on them. We believe what we have submitted correctly will cure what was not in your instructions on Friday and ask that this second instruction we have handed up be submitted.

* * *

[8140]

* * *

Unless a qualification applies, you cannot find Bakker to have violated the South Carolina Time-Share Act based on any act occurring on or before November 16, 1984. With respect to Deloitte, unless you find that it aided and abetted some violation of the act occurring after November 17, 1984, you must find for Deloitte on plaintiffs' South Carolina Time-Share Act aiding and abetting claim.

I just described to you the statute of limitations for the South Carolina Time-Share Act. In a case like this one, the time placed upon the plaintiffs began to run when the plaintiffs first knew or by the exercise of reasonable care should have known that the [8141] alleged fraud had occurred in connection with the purchase of Lifetime Partnerships. In this instance, the applicable limitation

period is three years. Defendants claim suit is barred because plaintiffs knew or by the exercise of care should have known more than three years before the commencement of this suit that the alleged fraud occurred in connection with the purchases of the Lifetime Partnerships.

As I have said before, this suit was commenced on November 17, 1987. Thus, if plaintiffs knew or by the exercise of reasonable care should have known by November 6, 1984 -- November 16, 1984, that the fraud had occurred, you must find for the defendant on the plaintiffs' claim under the South Carolina Time-Share Act.

* * *

[8269]

* * *

THE COURT: I certainly instructed on the substance of that request two or three times. I don't believe I'll repeat that.

MR. SINGER: Thank you, Your Honor.

THE COURT: Anything further?

MR. WALLAS: Your Honor --

THE COURT: Let's see, that is the statute of limitations.

[8270]

MR. WALLAS: Yes, sir. My understanding is, you are going to read the first one we requested, the Federal and State RICO, but you decline the read the second one; am I correct:

MR. SINGER: Your Honor, I think one goes with the other. I think it would give unfair and undue emphasis at this point to read that one page, when you have already instructed, other than the five-year issue, appropriately on all these issues.

MR. WALLAS: I think they are two different ones.

THE COURT: The only one I intend to give is the one on RICO statute of limnitations an equitable tolling.

MR. WALLAS: All right.

* * *

[Trial transcript p. 3639 - Cross exam of Spears]

* * *

The things that they mentioned were that he was an entertainment personality; that he was a fundraiser; that he was the chief executive officer of an over 100-million-dollar corporation, as well as being a minister, and that if you compared the amount he earned to other talk show hosts, if you compared the amount he earned to fundraising consultants, who often charge five or six percent of the total funds raised, that it was, they felt confident that they would win those arguments. It had nothing to do with my feeling about what he should have been paid or anything else. It was a professional issue of whether or not the attorneys reasonably expected to win the tax case, and it seemed that they did.

* * *

PTL LIFETIME PARTNERS' LITIGATION GROUP
730 E. Trade Street, Suite 700, Charlotte, NC 28202
(704) 375-7696 / Fax (704) 375-8186

* * *

RE: Teague v. Bakker--Clarification and Stipulation about Issues

Dear Counsel:

As we promised, we write to seek to clarify the issues that we do and do not intend to submit to the jury.

The issues that we do intend to submit to the jury are the following, and the nature of our claims against each party is indicated below. We expect our jury issues, instructions, and contentions will match this list, but expressly state that this list is our present intention subject to (unlikely) change, rather than a stipulation.

Claim (T is Taggart)	*Primary Fraud*	*Conspiracy*
A. FEDERAL RICO	Bakker	Deloitte/T
B. NORTH CAROLINA RICO	Bakker	Deloitte/T
C. FEDERAL SECURITIES	Bakker	
D. STATE SECURITIES	Bakker	Deloitte
E. STATE TIMESHARE	Bakker	Deloitte
F. STATE FRAUD	Bakker	Deloitte
G. STATE NEGLIGENCE		

	Aiding and Abetting	*Negligence*
A. FEDERAL RICO	Deloitte/T	
B. NORTH CAROLINA RICO	Deloitte/T	
C. FEDERAL SECURITIES	Deloitte	
D. STATE SECURITIES	Deloitte	
E. STATE TIMESHARE	Deloitte	
F. STATE FRAUD	Deloitte	
G. STATE NEGLIGENCE		Cortese/T

The issues that we do not intend to submit to the jury are on the next page, and are in the form of a stipulation, out of our sense of fairness to you and so that you may rely on it (subject to the qualification at the end).

Thank you. With kindest regards,

Sincerely,

/s/ Thomas T. Anderson
Thomas T. Anderson
Attorney at Law

/s/ Wendell R. Bird
Wendell R. Bird
Attorney at Law

cc: Jonathan Wallas, Esq.
Samuel F. Trussell, Esq.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
[STYLED OMITTED]
CIVIL ACTION
NO. CC-87-514-M

PLAINTIFFS' STIPULATION OF ISSUES NOT TO BE SUBMITTED TO THE JURY IN THIS TRIAL

Plaintiffs hereby stipulate that the following issues shall not be submitted to the jury at the conclusion of this trial, and are not submitting jury instructions on these issues:

1. RICO claims in Restated Amended Complaint §§ 241-276
2. North Carolina RICO claims in Restated Amended Complaint §§ 296-297, 300-313.
3. North Carolina timeshare claims in Restated Amended Complaint §§ 320-326, 337-344.
4. Federal securities § 12(2) claims in Restated Amended Complaint §§ 371-375C.
5. Federal securities registration claims in Restated Amended Complaint §§ 409-414.
6. North Carolina securities registration claims in Restated Amended Complaint §§ 415-19.
7. South Carolina securities registration claims in Restated Amended Complaint §§ 420-25.
8. North Carolina interference with property rights claims in Restated Amended Complaint §§ 428-429.
9. South Carolina fraudulent charitable solicitations and swindling claims in Restated Amended Complaint §§ 434-440.
10. Claims against Laventhol & Horwath, Spears, Messner, Messner Enterprises, and Commercial Builders in Restated Amended Complaint.
11. Donor fraud claims in Restated Amended Complaint §§ 61-104.

12. Secured Creditor (Messner, Commercial Builders, Messner Enterprises) claims in Restated Amended Complaint §§132-153R.

Plaintiffs do not hereby enter any stipulation in regard to a new trial, if the jury should be unable to reach a verdict or if a verdict should be reversed on appeal; or in regard to Laventhol & Horwath and Spears; and do not waive the foregoing issues in those events.

Dated November 30, 1990

Jonathan Wallas
[address omitted]
Thomas T. Anderson
[address omitted]
/s/ Wendell R. Bird
David J. Myers
[address omitted]
Attorneys for Plaintiffs
APPROVED BY THE COURT

_____

James B. McMillan
United States District Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading, and the accompanying exhibits, has been served upon counsel for all parties at interest in this case by telecopying a true and exact copy of said pleading to said counsel at.

This 30th day of November, 1990.

Thomas T. Anderson & Associates
By: /s/ Wendell R. Bird
BRIEFS/PTL/TMOTIONSP69/167

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
[STYLE OMITTED]
CIVIL ACTION
NO. CC-87-514-M
PLAINTIFFS' PROPOSED
JURY ISSUES

INTRODUCTION

Plaintiffs propose the following jury issues. Plaintiffs have followed the following approach: (i) the jury issues should be short, (ii) they should follow Devitt & Blackmar exactly when it has a form and should otherwise follow the same format, and (iii) they should be neutral and nonaggressive. Each form lists Devitt or the other source in the upper right, and shows any change from the verbatim form in the footnote. Each jury issue is one page, except that the RICO ones are a couple of pages. Plaintiffs disagree with Deloitte's long, non-standard, and argumentative and aggressive issues and instructions.

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Dated December 3, 1990.

Respectfully submitted,

Jonathan Wallas
[address omitted]
Thomas T. Anderson
[address omitted]
/s/ Wendell R. Bird
[address omitted]
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served upon counsel for all parties at interest in this case by delivering a true and exact copy of said pleading to said counsel.

This 3rd day of December, 1990.

Thomas T. Anderson & Associates

By: /s/ Jill Wright

Briefs/PTL/JuryInterrogs/167

PLAINTIFFS' JURY ISSUE NO. 1
DATED: DECEMBER 3, 1990

A. JURY ISSUES -- FEDERAL RICO

FEDERAL RICO SPECIAL VERDICT FORM PAGE 1
SOURCE: DEVITT § 100.12

QUESTION NO. 1

Do you find by a preponderance of the evidence that defendants Bakker, Deloitte Haskins & Sells, and/or Taggart violated Sections 1962(a), (b), (c), and/or (d), Title 18, U.S. Code--the federal RICO Act?

Bakker did violate:

Section 1962(a)___ Section 1962(b)___
Section 1962(c)___ Section 1962 (d)___

Bakker did not violate:

Section 1962(a)___ Section 1962(b)___
Section 1962(c)___ Section 1962(d)___

Deloitte Haskins & Sells did aid and abet Bakker in violation of:

Section 1962(a)___ Section 1962(b)___
Section 1962(c)___ Section 1962(d)___

Deloitte Haskins & Sells did not aid and abet Bakker in violation of: Section 1962(a)___ Section 1962(b)___
Section 1962(c)___ Section 1962(d)___

Deloitte Haskins & Sells did conspire with Bakker in violation of:

Section 1962(d)___

Deloitte Haskins & Sells did not conspire with Bakker in violation of: Section 1962(d)___

Taggart did aid and abet Bakker in violation of:

Section 1962(a)___ Section 1962(b)___
Section 1962(c)___ Section 1962(d)___

Taggart did not aid and abet Bakker in violation of:

Section 1962(a)___ Section 1962(b)___
Section 1962(c)___ Section 1962(d)___

Taggart did conspire with Bakker in violation of:

Section 1962(d)___

Taggart did not conspire with Bakker in violation of:

Section 1962(d)___

Answer the question about aiding and abetting only for those Sections, if any, where you find defendant Bakker liable for violating the Section. For example, defendant Deloitte Haskins & Sells could only be liable for aiding and abetting Section 1962(a) violations if Bakker violated it.

If you answered this Question as to any defendant "did violate Section 1962(a), 1962(b), 1962(c), and/or 1962(d)", including conspiracy under Section 1962(d), or "did aid and abet violation of Section 1962(a), 1962(b), 1962(c), and/or 1962(d)", answer Question No. 2.

If you answered this Question "did not violate Section 1962(a), 1962(b), 1962(c), and 1962(d)," including conspiracy under Section 1962(d), and "did aid and abet violation of Section 1962(a), 1962(b), 1962(c), and 1962(d)", as to all defendants, then do not answer questions 2 and 3. [footnote omitted]

APPROVED:_____

PLAINTIFFS' JURY ISSUE NO. 2
DATED: DECEMBER 3, 1990
FEDERAL RICO SPECIAL VERDICT FORM PAGE 2
SOURCE: DEVITT § 100.12
QUESTION NO. 2

If plaintiffs have shown that any defendant violated Section 1962(a), 1962(b), 1962(c), and/or 1962(d), plaintiffs must also show that, by reason of the defendant's violation of Section 1962, the plaintiffs in the Lifetime Partner class were each injured in their business or property by reason of the defendant's violation of Section 1962. In order to show injury, plaintiffs must show that they relied to the extent stated in the instructions given by the Court.

Plaintiff Lifetime Partner class was so injured by Bakker's violation of: *Section 1962(a)___* *Section 1962(b)___*
Section 1962(c)___ *Section 1962(d)___*

Plaintiff Lifetime Partner class was not so injured by Bakker's violation of: *Section 1962(a)___* *Section 1962(b)___*
Section 1962(c)___ *Section 1962(d)___*

Plaintiff Lifetime Partner class was so injured by Deloitte Haskins & Sells through conspiracy in violation of: *Section1962(d)___*

Plaintiff Lifetime Partner class was not so injured by Deloitte Haskins & Sells through conspiracy in violation of:
Section 1962(d)___

Plaintiff Lifetime Partner class was so injured by Deloitte Haskins & Sells through aiding and abetting in violation of:
Section 1962(a)___ *Section 1962(b)___*
Section 1962(c)___ *Section 1962(d)___*

Plaintiff Lifetime Partner class was not so injured by Deloitte Haskins & Sells through aiding and abetting in violation of:
Section 1962(a)___ *Section 1962(b)___*
Section 1962(c)___ *Section 1962(d)___*

Plaintiff Lifetime Partner class was so injured by Taggart through conspiracy in violation of: *Section 1962(d)___*

Plaintiff Lifetime Partner class was not so injured by Taggart through conspiracy in violation of: *Section 1962(d)___*

Plaintiff Lifetime Partner class was so injured by Taggart through aiding and abetting in violation of:

Section 1962(a)___ Section 1962(b)___

Section 1962(c)___ Section 1962(d)___

Plaintiff Lifetime Partner class was not so injured by Taggart through aiding and abetting in violation of:

Section 1962(a)___ Section 1962(b)___

Section 1962(c)___ Section 1962(d)___

If you answered this Question "the plaintiff Lifetime Partner class was injured", proceed to Question No. 3. [footnote omitted]

PLAINTIFFS' JURY ISSUE NO. 3
DATED: DECEMBER 3, 1990
FEDERAL RICO SPECIAL VERDICT FORM PAGE 3
SOURCE: DEVITT § 100.12
QUESTION NO. 3

What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff Lifetime Partner class for its damages, if any, proximately caused by one or more defendants' violation of Section 1962(a), (b), (c), and/or (d)? Answer in dollars and cents, if any.

ANSWER:

Bakker's violation of Section 1962(a), (b), (c), and/or (d):
*$*_____

The following portion of the above amount (all, part, or none) was proximately caused by Deloitte Haskins & Sells through

*aiding and abetting Bakker's violation of Section 1962(a), (b), (c), and/or (d): $*_____
*conspiring in Bakker's violation of Section 1962(a), (b), (c), and/or (d): $*_____

The following portion of the amount in the first blank (all, part, or none) was proximately caused by Taggart through

*aiding and abetting Bakker's violation of Section 1962(a), (b), (c), and/or (d): $*_____
*conspiring in Bakker's violation of Section 1962(a), (b), (c), and/or (d): $*_____

You are instructed that for damages to be proximately caused by a violation of Section 1962(a), (b), (c), and/or (d), the Lifetime Partner class must show that, except for the Section 1962 violation, such damage would not have occurred and must show the other things listed in the Judge's instructions. There may be more than one proximate cause of an event. [footnote omitted]

You should consider the amount of damages, if any, with respect to each claim separate and independent from the amount of

damages, if any, with respect to other claims. For example, and by way of example only, if you determine that damages should be awarded the plaintiffs under their RICO claim you should award full, just, and reasonable compensation for damages under the RICO claim, without regard to the damages, if any, you might award under any other claim. [footnote omitted]

PLAINTIFFS' JURY ISSUE NO. 4
DATED: DECEMBER 3, 1990
N.C. RICO SPECIAL VERDICT FORM PAGE 1
SOURCE: DEVITT § 74.10

B. JURY ISSUES -- STATE RICO

If you found in Question 1 above that any defendant violated the federal RICO Act, you should consider the following two questions.

QUESTION NO. 1

Do you find from a preponderance of the evidence that the following defendant was guilty of violation of the North Carolina RICO Act?

ANSWER:

Bakker did violate it:___
Bakker did not violate it:___
Deloitte Haskins & Sells did aid and abet Bakker in violating it:___
Deloitte Haskins & Sells did not aid and abet Bakker in violating it:___
Deloitte Haskins & Sells did conspire with Bakker to violate it:___
Deloitte Haskins & Sells did not conspire with Bakker to violate it:___
Taggart did aid and abet Bakker in violating it:___
Taggart did not aid and abet Bakker in violating it:___
Taggart did conspire with Bakker to violate it:___
Taggart did not conspire with Bakker to violate it:___

QUESTION NO. 2

Do you find from a preponderance of the evidence that the following defendant was guilty of violation of Section 14-92 of the North Carolina General Statutes (which forbids an officer of a charitable, religious, or educational institution from embezzling or corruptly using or misapplying money held in trust for the institution for any purpose other than that for which such money is held)?

ANSWER:

Bakker did violate it:___
Bakker did not violate it:___
Deloitte Haskins & Sells did aid and abet its violation:___
Deloitte Haskins & Sells did not aid and abet its violation:___
Deloitte Haskins & Sells did conspire to violate it:___
Deloitte Haskins & Sells did not conspire to violate it:___
Taggart did aid and abet in its violation:___
Taggart *did not aid and abet in its violation:___*
Taggart did conspire to violate it:___
Taggart did not conspire to violate it:___ [footnote omitted]

APPROVED:_____

PLAINTIFFS' JURY ISSUE NO. 5
DATED: DECEMBER 3, 1990
N.C. RICO SPECIAL VERDICT FORM PAGE 2
SOURCE: DEVITT § 100.12
QUESTION NO. 3

What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff Lifetime Partner class for its damages, if any, proximately caused by one or more defendants' violation of the North Carolina RICO Act? Answer in dollars and cents, if any.

ANSWER:

Bakker's violation of the North Carolina RICO Act:

$_____

The following portion of the above amount (all, pat, or none) was proximately caused by Deloitte Haskins & Sells through

aiding and abetting Bakker's violation of the North Carolina RICO Act:

$_____

conspiring in Bakker's violation of the North Carolina RICO Act:

$_____

The following portion of the amount in the first blank (all, part, or none) was proximately caused by Taggart through

aiding and abetting Bakker's violation of the North Carolina RICO Act:

$_____

conspiring in Bakker's violation of the North Carolina RICO Act:

$_____

There may be more than one proximate cause of an event. [footnote omitted]

APPROVED:_____

PLAINTIFFS' JURY ISSUE NO. 6
DATED: DECEMBER 3, 1990
SOURCE: DEVITT § 74.10

C. JURY ISSUES -- FEDERAL SECURITIES

QUESTION NO. 1

Do you find from a preponderance of the evidence that Lifetime Partnerships were securities?

ANSWER: *Yes*___ *No*___

QUESTION NO. 2

Do you find from a preponderance of the evidence that the following defendant was guilty of violation of Rule 10b-5 under federal securities law in connection with Lifetime Partnerships?

ANSWER:

*Bakker did violate it:*___

*Bakker did not violate it:*___

*Deloitte Haskins & Sells did aid and abet its violation:*___

*Deloitte Haskins & Sells did not aid and abet its violation:*___

QUESTION NO. 3

What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff Lifetime Partner class for its damages, if any, proximately caused by one or more defendants' violation of Rule 10b-5? Answer in dollars and cents, if any.

ANSWER:

Bakker's violation of securities Rule 10b-5:

$_____

The following portion of the above amount (all, part, or none) was proximately caused by Deloitte Haskins & Sells through aiding and abetting Bakker's violation of securities Rule 10b-5:

$_____

There may be more than one proximate cause of an event.

APPROVED:_____

PLAINTIFFS' JURY ISSUE NO. 7
DATED: DECEMBER 3, 1990
SOURCE: DEVITT § 74.10

D. JURY ISSUES -- STATE SECURITIES

QUESTION NO. 1

Do you find from a preponderance of the evidence that Lifetime Partnerships were securities under North Carolina law?

ANSWER: *Yes*___ *No*___

QUESTION NO. 2

Do you find from a preponderance of the evidence that Lifetime Partnerships were securities under South Carolina law?

ANSWER: *Yes*___ *No*___

QUESTION NO. 3

Do you find from a preponderance of the evidence that the following defendant was guilty of violation of North Carolina securities law (N.C. General Statute Section 78A-56(a)(2))?

ANSWER:

*Bakker did violate it:*___

*Bakker did not violate it:*___

*Deloitte Haskins & Sells did aid and abet violation of it:*___

*Deloitte Haskins & Sells did not aid and abet violation of it:*___

*Deloitte Haskins & Sells did conspire in violation of it:*___

*Deloitte Haskins & Sells did not conspire in violation of it:*___

QUESTION NO. 4

Do you find from a preponderance of the evidence that the following defendant was guilty of violation of South Carolina securities law (S.C. Code Section 35-1-1490)?

ANSWER:

Bakker did violate it:___

Bakker did not violate it:___

Deloitte Haskins & Sells did aid and abet violation of it:___

Deloitte Haskins & Sells did not aid and abet violation of it:___

Deloitte Haskins & Sells did conspire in violation of it:___
Deloitte Haskins & Sells did not conspire in violation of it:___ [footnote omitted]

APPROVED:_____

PLAINTIFFS' JURY ISSUE NO. 8
DATED: DECEMBER 3, 1990
QUESTION NO. 5

What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff Lifetime Partner class for its damages, if any, proximately caused by one or more defendants' violation of the North Carolina securities law? Answer in dollars and cents, if any.

ANSWER:

Bakker's violation of the North Carolina securities law:

$_____

The following portion of the above amount (all, part, or none) was proximately caused by Deloitte Haskins & Sells through

aiding and abetting Bakker's violation of the North Carolina securities law:

$_____

conspiring in Bakker's violation of the North Carolina securities law:

$_____

QUESTION NO. 6

What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff Lifetime Partner class for its damages, if any, proximately caused by one or more defendants' violation of the South Carolina securities law? Answer in dollars and cents, if any.

ANSWER:

Bakker's violation of the South Carolina securities law:

$_____

The following portion of the above amount (all, part, or none) was proximately caused by Deloitte Haskins & Sells through

aiding and abetting Bakker's violation of the South Carolina securities law:

$_____

conspiring in Bakker's violation of the South Carolina securities law:

$\$$_____

There may be more than one proximate cause of an event. [footnote omitted]

APPROVED:_____

PLAINTIFFS' JURY ISSUE NO. 9
DATED: DECEMBER 3, 1990
SOURCE: DEVITT § 74.10

E. JURY ISSUES -- STATE TIMESHARE

QUESTION NO. 1

Do you find from a preponderance of the evidence that Lifetime Partnerships were timeshares under South Carolina law?

ANSWER: *Yes*___ *No*___

QUESTION NO. 2

Do you find from a preponderance of the evidence that the following defendant was guilty of violation of South Carolina timeshare law (S.C. Code Section 35-1-1490) in connection with Lifetime Partnerships?

ANSWER:

*Bakker did violate it:*___
*Bakker did not violate it:*___
*Deloitte Haskins & Sells did aid and abet violation of it:*___
*Deloitte Haskins & Sells did not aid and abet violation of it:*___
*Deloitte Haskins & Sells did conspire in violation of it:*___
*Deloitte Haskins & Sells did not conspire in violation of it:*___ *[footnote omitted]*

QUESTION NO. 3

What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff Lifetime Partner class for its damages, if any, proximately caused by one or more defendants' violation of the South Carolina timeshare law? Answer in dollars and cents, if any.

ANSWER:

Bakker's violation of the South Carolina timeshare law:

$_____

The following portion of the above amount (all, part, or none) was proximately caused by Deloitte Haskins & Sells through

aiding and abetting Bakker's violation of the South Carolina timeshare law:

$_____

conspiring in Bakker's violation of the South Carolina timeshare law:

$_____

There may be more than one proximate cause of an event.

APPROVED:_____

PLAINTIFFS' JURY ISSUE NO. 10
DATED: DECEMBER 3, 1990
SOURCE: DEVITT § 74.10

F. JURY ISSUES -- STATE FRAUD

QUESTION NO. 1

Do you find from a preponderance of the evidence that fraud occurred under North Carolina law in connection with Lifetime Partnerships?

ANSWER: *Yes*___ *No*___

QUESTION NO. 2

Do you find from a preponderance of the evidence that the following defendant was guilty of violation of North Carolina fraud law in connection with Lifetime Partnerships?

ANSWER:

*Bakker did violate it:*___
*Bakker did not violate it:*___
*Deloitte Haskins & Sells did aid and abet violation of it:*___
*Deloitte Haskins & Sells did not aid and abet violation of it:*___
*Deloitte Haskins & Sells did conspire in violation of it:*___
*Deloitte Haskins & Sells did not conspire in violation of it:*___ *[footnote omitted]*

QUESTION NO. 3

What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff Lifetime Partner class for its damages, if any, proximately caused by one or more defendants' violation of the North Carolina fraud law? Answer in dollars and cents, if any.

ANSWER:

Bakker's violation of the North Carolina fraud law:

$_____

The following portion of the above amount (all, part, or none) was proximately caused by Deloitte Haskins & Sells through

aiding and abetting Bakker's violation of North Carolina fraud law: $_____

conspiring in Bakker's violation of North Carolina fraud law: $_____

There may be more than one proximate cause of an event.

QUESTION NO. 4

If you find that one or more defendants violated North Carolina fraud law under Question 2, in your discretion, what amount of punitive damages, if any, should be awarded to the plaintiffs? [footnote omitted]

ANSWER:

From defendant Bakker $_____

From defendant Deloitte Haskins & Sells $_____

APPROVED:_____

PLAINTIFFS' JURY ISSUE NO. 11
DATED: DECEMBER 3, 1990
SOURCE: DEVITT § 74.10

G. JURY ISSUES -- NORTH CAROLINA NEGLIGENCE

QUESTION NO. 1

Do you find from a preponderance of the evidence that the following defendant was guilty of negligence in performing any one or more of the specific acts of negligence alleged by the plaintiff Lifetime Partner class?

ANSWER:

*Cortese was negligent:*___
*Cortese was not negligent:*___
*Taggart was negligent:*___
*Taggart was not negligent:*___

QUESTION NO. 2

Do you find from a preponderance of the evidence that the negligence of the following defendant was either the sole proximate cause or a contributing proximate cause of the injuries to the plaintiff Lifetime Partner class?

ANSWER:

*Cortese's negligence was a proximate cause:*___
*Cortese's negligence was not a proximate cause:*___
*Taggart's negligence was a proximate cause:*___
*Taggart's negligence was not a proximate cause:*___

[footnote omitted]

QUESTION NO. 3

What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff Lifetime Partner class for its damages, if any, proximately caused by one or more defendants' negligence? Answer in dollars and cents, if any.

ANSWER:

Cortese's negligence: $_____
Taggart's negligence: $_____

There may be more than one proximate cause of an event.

APPROVED:_____